Supreme Court of the United States.

OCTOBER TERM, 1873.

No. 164—Equity.

CLARKE ET AL.

vs.

JOHNSTON AND NORRIS, BOORMAN'S EXECUTORS.

Appeal from the Circuit Court of the United States for the Southern District of New York.

ARGUMENT FOR APPELLANTS.

LOUIS JANIN,
Of Counsel.

Judd & Detweiler, Printers.

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The bill charges that the complainants are the sole heirs of their late father, George Augustus Duncan Clarke, the son of the late John X. Clarke and the late Jeanet Smith, his wife, and that the said George Augustus Duncan Clarke, by the will and codicil of his grandfather, James R. Smith, was the devisee in fee of two-thirds of one-fourth of said testator's estate remaining after the payment of all debts and legacies, and that the said father of the complainants

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was deprived of said valuable legacy by the fraud and breach of trust of the two acting executors of said James R. Smith, to wit: Matthew St. Clair Clarke, who died many years ago, and James Boorman, who died only a few years ago, and whose estate is sought to be made responsible for the loss thus sustained by the complainants.

The two answers of the defendants were, in substance, a general denial, and other matter of defence to be noticed hereafter.

The Hon. Louis B. Woodruff, circuit judge of the second judicial circuit of New York, having declined to hear this case, the same was argued before the Hon. Samuel Blatchford, judge of the southern district of New York, who decided it against the plaintiffs and dismissed the bill, from which decision the complainants now appeal.

Assignment of errors.

The opinion of the honorable judge is printed in 8 Blatchford's Report, p. 557, and its purport will be fully understood from the syllabus and the concluding portion of that opinion, which are herewith copied:

Syllabus:

A codicil to a will contained the following provision: "The remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct, and not liable to the control, debts, or engagements of either of their husbands, which they now have, or may hereafter have, as well those who are married as she who may hereafter marry, giving, however, to the husband of either or all of them, in case the wife shall die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live arising from his wife's portion, and, after his death, then to the child or children of my said daughter so dying." *Held*, that there was in such provision no expression or indication of any intention on the part of the testator that there should be a limitation over in favor of the children of a daughter who should survive her husband; and that where the husband of such daughter died, and she survived

him, his death terminated the operation of the provision for his life estate, and the operation of the provision in favor of the child or children of his wife.

Closing part of the decision:

The first question to be considered is the proper construction of the provision of the twelfth clause of the codicil as to the two-thirds of each daughter's share. So far as Jeanet Clarke's two-thirds of her share is concerned the fact that the plaintiffs' father survived his mother, and died when over twenty-one years of age, leaving issue, defeated the limitation over to her brother and sisters and their issue, in any view that may be taken of the provision for such limitation over. The only practical question, therefore, is, as to what estate Jeanet Clarke took in the two-thirds of her share of the estate. The controlling provision is thus worded: "The remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct, and not liable to the control, debts, or engagements of either of their husbands which they now have, or may hereafter have, as well those who are married as she who may hereafter marry, giving, however, to the husbands of either or all of them, in case the wife shall die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and after his death, then to the child or children of my said daughter so dying." It is impossible to say that there is, in this provision, or in any part of the twelfth clause of the codicil, the expression or indication of any intention on the part of the testator that there should be a limitation over in favor of the children of a daughter who should survive her husband. The two-thirds of the daughter's share is to be held separate and distinct, and so that, if he survive her, he may have the income of it for his life. If he does not survive her, the fee of such two-thirds is freed from all possibilities in favor of her children, and remains subject only to the contingent provision in favor of the other children of the testator and their issue. The provision in favor of the child or children of a daughter "so dying," is one that is expressly made to take effect only after the death of the husband of a daughter who survives such daughter. Jeanet Clarke survived her husband. His death terminated the operation of the provision for his life-

estate, and the operation of the provision in favor of the child or children of his wife. It is admitted on the part of the plaintiffs that they have no cause of action unless Jeanet Clarke took only a life-estate in the two-thirds of her share, and unless, at her death, such two-thirds passed to the plaintiffs' father. As the two-thirds of her share did not pass to the plaintiffs' father, it follows that the bill must be dismissed with costs.

The complainants submit that this construction of the 12th article of the codicil of Jas. R. Smith is palpably erroneous; that such a conclusion could only be arrived at by a forced and unnatural construction of the terms of this instrument; and that from the whole of said codicil, and the circumstances of the case, it is apparent that James R. Smith intended to treat the children of each of his three daughters alike.

This interpretation of the will, erroneous in our belief, is the error we have to assign in the decision of the circuit court, none of the other matters of defence set up by the appellees having been noticed by the circuit court. We beg leave to anticipate the proper decision of this question by a single observation well worthy of notice. We are thoroughly persuaded that the discussion by Chief Justice Marshall concerning the terms of a will, and the intentions of the testator, in the case of John Smith T. *vs.* Bell, 6 Peters, 68, has a most important bearing upon the present case. These two cases are so analogous that if the learning and equity of Chief Justice Marshall are still good, then the will of J. R. Smith in our case, must be understood as we claim.

We printed two briefs in this case for the use of the circuit court. The learned counsel for the appellees also printed a brief and a supplement. In our two briefs we referred to the case of John Smith T. *vs.* Bell, and quoted from it at length. But neither the briefs of the appellees nor the opinions of the circuit court ever mentioned it; from which we infer that it is unanswerable.

The remainder of Judge Blatchford's opinion is a statement of the facts of the case, full enough for the purpose of

a judicial opinion, but not as full as is required of a complainant, who has to prove his assertions by references to the record. We shall therefore marshal the facts and evidence exhibited in the voluminous record, in such a manner that the court can, without loss of time, sift any point which may be considered worthy of special attention. We shall begin with a summary statement of facts, and then present the principal points of the defence, and the evidence showing that such defence is not applicable to the present case.

The appellants are the minor children and heirs of George Augustus Duncan Clarke, who was born on November 2, 1815, and died at Washington city on the 14th of October, 1855. He was the son of John X. Clarke and of Jeanet Smith, his wife, the former of whom died in 1824, and the latter on the 5th of September, 1847. Jeanet Smith Clarke was one of the four children of James R. Smith, a wealthy merchant of New York city, who died early in the month of June of 1817, leaving a will executed on the 23d of January, 1817, and a codicil executed on the 30th of May, 1817, which were duly probated before the surrogate of the county of New York on June 11, 1817. By these testamentary dispositions James R. Smith devised to the said G. A. D. Clarke, his grandson and the father of the complainants, two-thirds of one-fourth in fee of all his residuary estate remaining after the payment of all debts and legacies, reserving to the said Jeanet, the mother of said G. A. D. Clarke, a life estate therein; but although the said two-thirds of one-fourth consisted of most valuable real estate, neither the said G. A. D. Clarke nor the complainant ever derived the least benefit from said bequest, having been defrauded of the same by the breach of trust of the two acting executors of the said James R. Smith, to wit, Matthew St. Clair Clarke and James Boorman, the former of whom was the active perpetrator of the frauds by which the complainants and their father were deprived of their inheritance, and the latter having rendered possible and aided in the perpetration of these frauds by his

willful default, neglect of duty, and connivance with the said Matthew St. Clair Clarke. And as the said Matthew St. Clair Clarke died in 1852, utterly insolvent, the injured parties seek redress from the wealthy estate left by the said James Boorman, represented by his executors, the appellees in this case. That estate is responsible to them, because without the assent of the said Boorman to and his connivance in the fraudulent doings to which they and their said father fell victims, they never could have been despoiled of their inheritance; therefore Boorman must be held responsible to the appellants, whether these doings were the result of ignorance, bad advice, weak compliance with the wishes of an artful but unscrupulous associate, or positive interested fraud. In any of these hypotheses the result is the same to the appellants, positive ruin; and he who was bound to protect them, and failed to do so, and on the contrary smote them, and by his tolerance and signature brought about this ruin, is responsible for it.

A remarkable feature of this case is the distant date when this fraud was accomplished, to wit: the 26th of December, 1829. This furnished to the skilful advocates of the appellees the only plausible ground of defence which they set up, to wit: the statute of limitations. But this will be found to be wholly inapplicable when the facts of the case come to be understood. It is probable that no case of a claim based on fraud can be found in the books, where the plaintiff labored under greater difficulties to ascertain the circumstances under which, and by which they had been defrauded. This knowledge could never have been acquired by them unaided, owing to the mystery in which the case was shrouded, their distance from the scene of action, the great length of time and great expense which such an investigation would have required, the utter destitution to which the deprivation of his property by the acts of the executors had exposed the father, and their own minority, and residence in another State, where, through the assistance of relations, they obtained their education and

the means of livelihood. But for a singular incident this claim would never have ripened into a well-established suit, and that incident was a claim of the Treasury of the United States against Joseph Duncan, of Illinois, who had married another daughter of Jas. R. Smith and sister of Jeanet Clarke. The Treasury of the United States having better means of inquiry at command than these unprotected minors, and having ascertained that Mrs. Duncan had inherited considerable property from her father, which it was thought might be made answerable for the claim of the Government against the said Duncan, employed a gentleman of Illinois, by the name of Snow, to investigate the matter, and he in turn employed a very competent lawyer, Mr. Joseph B. Stewart, to pursue these researches. With this view, Mr. Stewart established himself in the city of New York, and, after spending years of time, and between nine and ten thousand dollars in money, succeeded in unravelling the mystery of the settlement of James R. Smith's large and complicated estate. Finding that these appellants were interested in that estate, and had been grossly defrauded, he sought them out, and, not without trouble, discovered them and their mother in a garret, promised assistance to them, and, when his engagements prevented his further attention to this matter, generously placed the information, and better still, the evidence he had collected, at their disposal. This was in 1863, during the then existing and still continuing minority of these appellants. The facts alleged in the bill of complaint were entirely and exclusively obtained from Mr. Stewart, and are fully proved by the evidence now before the court.

We now proceed to state the most material of these facts, though at less length than in the bill.

By his will, dated the 23d of January, 1817, the testator, James R. Smith, appointed five executors, two only of whom acted in the settlement of the estate, to wit: Matthew St. Clair Clarke and James Boorman, and authorized his executors in their discretion to sell, in fee simple or otherwise,

the whole or any part of his estate, real or personal, and directed that out of his estate all his just debts, funeral charges and expenses, should be paid; and that the residue of his estate, unless the same or any part thereof should be otherwise disposed of by a codicil or codicils, should be distributed according to the laws of the State of New York in the same manner as if he had died intestate. (Rec., p. 156.) On the 30th of May, 1817, James R. Smith made a codicil to his said will, which he divided into twelve parts, the most material of which is the twelfth, under which the present suit arises, and which we, therefore, transcribe entire. (Rec., pp. 123–124:)

"*Twelfth.*—All the rest, residue and remainder of my estate, of every kind and nature whatsoever and wheresoever situate, I give, devise, and bequeath unto my said executors in trust, that the same shall be equally divided to and amongst my four children, share and share alike, and to their respective heirs. My will further is, that my son James, and my daughter Elizabeth, shall each have the sum of fifteen hundred dollars set apart by my said executors for their support and education until they shall arrive at the age of twenty-one; and, if that sum shall not be found sufficient, my executors shall take such further sum from their respective shares of my estate as shall be necessary; and I do hereby give the tuition, care, and guardianship of my said son James, and my daughter Elizabeth to my said wife; my will further is, that my son James shall not come to the full possession and enjoyment of his portion of my estate until he shall arrive at the age of twenty-five years, nor shall he have the power to pawn, pledge, mortgage, or dispose of the same, or any part thereof, before the expiration of that time, but shall be entitled to receive the income arising from his portion between the years of twenty-one and twenty-five. I further direct that my daughters Jeanet, Hannah, and Elizabeth, if she should arrive at the age of twenty-one years, have the privilege of expending and appropriating, by and with the consent of the executors, one-third part of their portion of my estate, herein devised to them, in such manner as they may think proper, and over which, when so appropriated, they shall have absolute control; and the remaining

two-thirds of the portions or shares of my daughters shall be held separate and distinct, and not liable to the control, debts, or engagements of either of their husbands, which they now have, or may hereafter have, as well those who are married, as she who may hereafter marry, giving, however, to the husbands of either or all of them, in case the wife should die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and after his death, then to the child or children of my said daughter so dying; and if either of my daughters shall die without lawful issue, or having issue which shall not attain the age of twenty-one years and without issue, then the share or portion of my said daughter after the death of her husband, or if there be no husband living at her death, shall go and be divided among my other children, share and share alike, and to their issue, in case of the death of either of them, share and share alike, such issue to take the portion that would have belonged to his, her, or their father or mother."

No inventory of the estate of James R. Smith was ever filed in the surrogate's office, or anywhere else, so far as it has been possible to ascertain in the progress of the trial of this case. The obvious meaning and import of the will of the said James R. Smith, as modified by his codicil, was to devise and bequeath the residue and remainder of his estate, after paying debts and legacies, to his executors in trust, to be divided equally amongst his four children, share and share alike, *and to their respective heirs.* The mode of the division and the respective kinds of estate which either the children or the grandchildren were to take, is further described in the remainder of the article of the codicil. Each of the four children was to take one-fourth of the estate, but the son was to take his fourth in fee, and each of the three daughters was to take one-third of her fourth in full ownership, and a life estate only in the other two-thirds of her fourth, with remainder over of that life estate to her husband if he should survive her, and, after his death, the fee of these two-thirds of the mother's fourth was to go to her

child or children, if they attained the age of twenty-one; but if they died before that age, and without issue, then to the other children of the testator or their surviving heirs.

The four children of the said James R. Smith, at the time of his death, were:

1. Jeanet, the wife of John X. Clarke, who then had a child living, G. A. D. Clarke, the father of the appellants.

2. Hannah, then the wife of Matthew St. Clair Clarke, who had then children living. This Matthew St. Clair Clarke was the brother of John X. Clarke, the husband of Jeanet.

3. Elizabeth, then a minor and unmarried, who afterwards became the wife of Joseph Duncan.

4. James C. R. Smith, the only son of James R. Smith.

The whole aspect of the case, as developed by the evidence hereafter to be noticed, irresistibly produces the moral conviction that, at this early date already, Matthew St. Clair Clarke, the managing executor, and husband of one of the daughters of James R. Smith, and his said wife, whose enjoyment of her inheritance was restricted to a life-estate to the extent of two-thirds, were displeased with this curtailment of their expectations, and anxious to possess in their own lifetime the full enjoyment and power of alienation of the two-thirds reserved to their children, and for this purpose were planning to deprive their children of these two-thirds, and were preparing the same course of action for Jeanet, to the prejudice of her son;—Matthew St. Clair Clarke well knowing that what he could secure for said Jeanet, by hook or by crook, would come into his own hands, and be enjoyed by him, on account of the mental incapacity of Jeanet and her entire dependence upon him, than which nothing is better proved in this case. There never was any difficulty about the share of Elizabeth Duncan, who is surviving, and whose share was enjoyed by herself and her family, being sedulously protected by her husband.

But the children of Matthew St. Clair Clarke himself, and

the child of Jeanet, were, by his stratagems, despoiled of their inheritances. The former, however, as members of his immediate family, enjoyed the fruits of this ill-gotten wealth, and are, by other unanswerable reasons, precluded from making any claim now. But Jeanet's son, the father of the plaintiffs, never received anything whatever from his grandfather's estate, not even a miserable pittance to establish himself in commercial business, and had to linger out a precarious existence as a clerk until he died, leaving to his minor children the desperate chance of being, by the merest accident, put in possession of a knowledge of their rights.

The estate remained for a long time under the control of the executors, who paid the debts and legacies, and provided for the wants of the widow and the children. No immediate necessity existed for the division of the estate until J. C. R. Smith attained the age of 25 years, at which period only, he was to be put in possession of his fourth, and this occurred in 1829. During this interval various matters occurred in the settlement of the estate, of which we are not sufficiently informed, and which we designedly neglect, as we confine our claim to the recovery of indemnity for the abstraction of what was undoubtedly and exclusively our own property.

The largest legacy in money made by the codicil of Jas. R. Smith was one of $25,000 to his widow. She afterwards married John R. B. Rogers, and died in 1825, leaving a will, dated the 12th of July, 1821, (Rec., p. 125,) the principal provision of which was that she left the net residue of her estate to her four children, the issue of her marriage with the said James R. Smith, in equal shares.

It seems by the statement of the parties who were at the same time the heirs of Jas. R. Smith, their father, and of Hannah Rogers, their mother, contained in deeds hereafter mentioned, that the legacy made by the former to the latter had not entirely been paid, and therefore left the estate of said James R. Smith indebted to the estate of the said Hannah Rogers in the sum of $14,653.22. And, whereas, by

the will of said Hannah Rogers, each of her aforesaid four children and heirs was entitled to one-fourth part of said sum, to wit, the sum of $3,663.05; the said parties agreed among themselves that each of them should take in payment of his or her said claim lots of ground situated in the city of New York, at a valuation made on the 21st of October, 1829, by James Boorman, Thomas Suffern, and Robert Dyson, at the request and with the consent of all the said heirs. And, thereupon, on the 15th of November, 1829, the said executors, in conjunction with such of the heirs as were not grantees, conveyed to each of the aforesaid heirs, lots of the estate of James R. Smith, situated in the city of New York, in payment of the aforesaid sum of $3,663.05,—the sale to satisfy the claim of the said Hannah Rhea Clarke, the wife of said Matthew St. Clair Clarke, being made to said Robert Dyson, who immediately, on the same day, reconveyed the same property to the said Matthew St. Clair Clarke.

On the same day, to wit, the 15th of November, 1829, (Rec. 197,) the said executors, James Boorman and Matthew St. Clair Clarke, the said Jeanet Clarke, by the said Matthew St. Clair Clarke, her attorney-in-fact, the said Matthew St. Clair Clarke and Anna Rhea Clarke, his wife, and Joseph Duncan and Elizabeth C., his wife, legatees and devisees under the will of James R. Smith, executed an indenture in favor of the said James C. R. Smith, in which it was declared that whereas, by the will and codicil of the said James R. Smith, it was provided that the said James C. R. Smith should, after he attained the age of twenty-five years, receive one-fourth part of the residue of the estate of said James R. Smith in full ownership; and whereas all the parties to the said indenture were then of lawful age, and the said James C. R. Smith was over the age of twenty-five years, and entitled to demand from the said executors one-fourth part of said estate; and whereas the residue of said estate, after paying the debts by the sale of part of it, was *principally in real estate, and the said parties were desirous*

to avoid the sacrifice which would follow the sale of said estate by the executors, and the said parties, by universal consent, had parted, divided, and valued said estate in four equal parts in value, " as by reference to articles of agreement, dated October 1st, 1829, *will appear ;"* they confirmed and conveyed to said James C. R. Smith certain real estate, thereafter described, as parted, divided, and valued to him, which the said James C. R. Smith accepted and received as his one-fourth part of said estate.

On the same day, viz., November 15, 1829, the executors, and the other heirs of James R. Smith executed another indenture in favor of said Jeanet Clarke, in which they set forth, *besides the passages italicised in the notice of the immediately preceding deed*, that the said James R. Smith had directed and declared that his daughters, Jeanet, Anna, and Elizabeth, if she should attain the age of twenty-one, (which she then had attained,) should have the privilege of expending and appropriating, with the consent of the executors, one-third part of their respective portions as they might think proper, and over which, when so appropriated, they should have absolute control ; that accordingly certain real estate described in said deed had been set aside as the one-third part of the one-fourth part devised and bequeathed to the said Jeanet Clarke ; and that they therefore granted and conveyed to her the aforesaid real estate in satisfaction of the third part, subject to her absolute and entire control, of the fourth part devised and bequeathed to her. (Rec. 193.)

Another deed, precisely similar in tenor to the preceding one, and varying from it only in the description of the property, was executed on the same day to Joseph Duncan and Elizabeth C., his wife. (Rec. 177.) Another similar deed, intended for the benefit of Matthew St. Clair Clarke and Anna Rhea, his wife, was taken in the name of Robert Dyson, who immediately reconveyed the said property to the said Matthew St. Clair Clarke and Anna Rhea, his wife.

Thus the entire estate of James R. Smith was disposed of,

excepting only the two-thirds of the shares of each of the three daughters. By the 12th article of the codicil, each of these daughters was to have a life estate in her two-thirds, and this life estate was to go over to her husband, if he should survive her, and after his death, or after her death, if she should die a widow, the two-thirds were to go to her child or children, and if she should die leaving a child or children who died before the age of twenty-one without issue, this interest was to go to the other children of the testator, James R. Smith. Any child of either of the daughters of Jas. R. Smith, who survived his mother and father, took the fee of the two-thirds of the fourth of his mother, after attaining the age of twenty-one years, and this was the case with the father of the appellants.

All these trusts were violated, and for what purpose? Clearly, in order to give, by a fraudulent perversion of the form of their title, to the daughters of James R. Smith such an apparent title in fee as would enable them to sell it to uninformed *bona fide* purchasers, and thereby to enjoy in their own lifetime the proceeds of property which did not belong to them, but to their own children. Such was undoubtedly the purpose of Matthew St. Clair Clarke and Anna Rhea, his wife. Jeanet had no will of her own. Such was probably not the intention of James Boorman, but this is nevertheless what he undoubtedly did; and whether he did it intentionally or not, he produced, by his unjustifiable acquiescence, the same disastrous effect upon the father of the appellants, and is therefore responsible for it.

And how was this accomplished? These two-thirds were what the testator called his "reserved estate." The executors had no right to sell it, but were bound to preserve it for the purpose of the various trusts of which it was the subject. Although all this property had been valued, parted, and divided by consent of parties under the above-mentioned agreement of October 21st, 1829, (which was not put on record, but is referred to in the above-mentioned deeds of

November 15, 1829,) and the parties had declared that a sale by the executors would be ruinous, the executors and all the heirs executed on the 26th of December, 1829, an absolute (Rec. 205) sale in fee of it to Robert Dyson in block, nominally for the sum of $64,710.59 in cash, which the executor, Matthew St. Clair Clarke, acknowledged to have received, and on the same day the said Dyson executed conveyances in fee of the whole of said property, in three divided portions, to the three daughters of James R. Smith and their surviving husbands, undoubtedly conveying to each of said daughters the property which, by the aforesaid partition of October 21, 1829, had been allotted to and accepted by her as her share in her father's residuary estate. (Rec. 205, 211, 214 and 225.) In all these conveyances no mention is made of the provisions of the will and codicil of the said James R. Smith in favor of his daughters *and their children ;* the title is transferred in fee, and such as the said James R. Smith held in his lifetime.

It is therefore evident (Rec., 225) that one of the aforesaid conveyances of December 26, 1829, to wit, the one from Robt. Dyson to Jeanet Clarke, embraced the two-thirds of the one-fourth of the residuary estate of said James R. Smith, which had been allotted to the said Jeanet by the said partition of October 21st, 1829, and in which she had a life estate, but of which the fee was to vest in the father of the appellants on his attaining the age of twenty-one years. And as Jeanet's son survived her, and died after having attained that age, leaving the appellants his legitimate issue, and as said deed describes the property which in their father's lifetime belonged to him, they now claim from the surviving executor of the estate of James R. Smith the delivery thereof, and if its delivery in kind should be impossible, as it evidently is, then they claim the value thereof.

And the said deed of indenture is literally as follows, (Rec., p. 225 :)

This Indenture, made this twenty-sixth day of December,

anno Domini one thousand eight hundred and twenty-nine, between Robert Dyson, of the city and State of New York, of the first part, and Jeanet Clarke, widow, of Green Castle, Pennsylvania, of the second part, witnesseth, That for and in consideration of the sum of twenty-one thousand five hundred and seventy-three dollars thirteen cents, lawful money in hand paid by Jeanet Clarke, party of the second part, the receipt whereof the said Robert Dyson, party of the first part, doth hereby acknowledge before the ensealing and delivery of these presents, the said Robert Dyson, party of the first part, has granted, bargained, and sold, remised, released, enfeoffed, and confirmed, and by these presents does grant, bargain, and sell, remise, release, enfeoff, and confirm to the said second party, Jeanet Clarke, her heirs and assigns, all and singular the hereinafter described lots and parcels of ground, situate, lying, and being in the State of New York, and city of New York, more particularly described, as follows, to wit: In the northeast section of township No. one, Watkins' and Flint's purchase, Tioga county, the following subdivisions as laid off and surveyed by Darius Bentley, on the tenth day of January, 1821, to wit: Lots No. three, containing 68 acres 56-100; No. seven, containing 99 acres 12-100; No. eighteen, containing 100 acres 48-100; No. twenty-seven, containing 99 acres 9-100, and west half of No. twenty-eight, containing 47 acres 39-100, sold together to William Fisk by articles of agreement; No. thirty-one, containing 99 acres 70-100; No. 42, containing 102 acres 8-100; No. forty-four, containing 94 acres 78-100; No. fifty, containing 119 acres 18-100, and No. fifty-four, containing 117 acres 95-100. In Randolph township, Broome county, subdivision No. three, in great lot No. 15; subdivisions Nos. four and six, in great lot No. 17; subdivisions Nos. three, seven, and eight, in great lot No. 22; subdivisions Nos. one and three, in great lot No. 27; all and every of said subdivisions containing eighty acres. In great lot No. 17, Fayette, now Easton, subdivision No. two, being the southwest one-fourth part, contracted for to Richard Mudge and Jesse Skinner, containing 160 acres. In Tioga county, township No. six, of Watkins' and Flint's purchase, north part of southwest section, subdivision No. thirty-two, containing 297 acres; and in the northwest section of township No. nine, as above, subdivisions No. two, south half thereof, containing 101

acres; and No. four, west half thereof, containing 101 acres. Also, in township No. six, Clinton county, subdivision No. one, being the northeast one-fourth part of great lot No. six, containing 156 acres, 2 rods, and 17 perches; subdivision No. three, being the southeast one-fourth part of great lot fifty-seven, containing 179 acres, 3 rods, 16 perches; subdivision No. two, being the northwest one-fourth part of great lot No. sixty-six, containing 212 acres, 2 rods, 28 perches; subdivision No. one, being the northeast one-fourth part of great lot No. sixty-nine, containing 159 acres, 1 rod, 3 perches; and subdivision No. two, being the northwest one-fourth part of great lot No. eighty-four, containing 168 acres and 17½ perches. In township No. four, Clinton county, subdivision No. two, being the northwest one-fourth part of great lot No. thirteen, containing 160 acres. In township No. seven, Franklin county, subdivision No. three, of remainder of great lot No. twelve, containing 82 acres 1 rod; subdivision No. three, of remainder of great lot No. forty-five, being the southeast one-fourth part, containing 41 acres, 3 rods, 24 perches; a subdivision of great lot No. forty-seven, being 50 acres, contracted for to Rufus Morse; subdivision No. two, being the northeast, being the one-fourth part of the remainder of great lot No. fifty, containing 82 acres, 1 rod; subdivision No. one, being the south half of the Chamberlain lot in great lot No. fifty-nine, containing 140 acres; subdivision No. three, being the southeast one-fourth part of great lot No. seventy-five, containing 195 acres, 1 rod, and 2 perches; and subdivision No. five, of great lot No. ninety, containing 100 acres. In the township of Erin, Tioga county, in great lot No. one hundred and forty-nine, subdivision No. six, containing 101 acres and one perch; subdivision No. nineteen, containing 116 acres and 35 perches, contracted for to Martin and Stephen Derry. In great lot No. seventy-six, Fabius, now Truxton, Courtland county, subdivision No. eight, contracted for to Job Whitemarsh, containing 56 acres. In Ulster county, Hardenburg patent, 5th allotment, subdivision No. three, of great lot No. six, the subdivision No. two hundred and thirty-seven, containing 140 acres, 2 rods; and No. two hundred and sixty-seven, containing 136 acres. In the township of Chemung, Tioga county, great lot No. 137, subdivision No. seven, containing 117 acres, 2 rods, 16 perches; and the west one-half subdivision No. eight, contracted for to George Cooper, containing

58 acres, 3 rods, and 8 perches; also subdivision No. fifteen, containing 62 acres, 3 rods, and 29 perches; in last aforesaid county, in great lots Nos. 109, 110, and 113, as subdivided lot No. six, contracted for to James Boylan, containing 98 acres; and lot No. 17, contracted for to —— Brown, containing 109 acres, 1 rod, and 34 perches; and in great lot No. 173, in said county, subdivision No. eleven, containing 102 acres; subdivision No. fifteen, containing 120 acres; and subdivision No. eighteen, containing 98 acres. In the city of New York, on Stanton street, lots Nos. one, four, and seven, as subdivided into nine equal lots, between Forsyth and Eldridge streets, and which lots are formed out of six lots known and designated on the plan of said city as lot No. 1,479, the corner of Forsyth and Stanton; No. 1,478, on Forsyth; No. 1,477, on same; No. 1,455, the corner of Stanton and Eldridge; and Nos. 1,456 and 1,457, on Eldridge street. In the great lot called the John Kerr lot, lying between the Fifth and Sixth avenues, and embracing a part of Seventeenth, Eighteenth, and Nineteenth streets, as subdivided lot No. seven, on Seventeenth street; Nos. fifty, fifty-one, seventy, seventy-one, on Eighteenth street; Nos. eight-one, eighty-two, ninety-five, ninety-six, one hundred and one, and one hundred and two, on Nineteenth street; and fractional lots Nos. thirty-one and thirty-four, on eighteenth street; also lots Nos. two and six, in the subdivision of great lots Nos. 28 and 32, called the Stewart lots, situate between the Seventh and Eighth avenues, on Twenty-sixth and Twenty-seventh streets, said great lots being subdivided into eight lots, each being about twenty-four feet ten inches in front and rear, and about two hundred and forty feet deep. All of which said several tracts of lands and lots of ground to be holden by their several descriptions, be their contents more or less. To have and to hold the said tracts of land and lots of ground, with the appurtenances and improvements thereon, to her, the said Jeanet Clarke, party of the second part, her heirs and assigns forever, to the only proper use, benefit, and behoof of the said Jeanet Clarke, her heirs and assigns forever, hereby vesting in her, the said Jeanet Clarke, her heirs and assigns forever, all the right, title, and interest of said Robert Dyson, party of the first part, in and to the aforesaid described tracts of land and lots of ground.

In witness whereof, the said Robert Dyson, party grantor,

has hereunto set his hand and affixed his seal, the day and year first herein written.

ROBERT DYSON. [L. S.]

Signed, sealed, and delivered in presence of us, Robert C. Ludlow.

CITY AND COUNTY OF NEW YORK, *ss:*

On the ninth day of July, in the year of our Lord one thousand eight hundred and thirty, before me came Robert Dyson, known to me to be the individual described in, and who executed the above conveyance, who acknowledged that he executed the same.

ROBERT C. LUDLOW,
Commissioner of Deeds.

Recorded the preceding at the request of P. W. Radcliff, this 28th of December, 1830, at 50 minutes past 1 p m.

JAMESON COX, *Register.*

OFFICE OF THE REGISTER OF DEEDS, &C., } *ss:*
City and County of New York, }

I have compared the annexed copy with an instrument recorded in this office on the 28th day of December, 1830, at one o'clock, and 50 min., P. M., in Liber No. 267 of Conveyance, page 335, and certify the same to be a correct transcript therefrom, and the whole of said instrument. I further certify that there is no official seal belonging to this office.

Dated this 26th day of July, A. D. 1862.

JOHN KEYSER, *Register.*

Thus the daughters of J. R. Smith were enabled to hold themselves out as the owners in fee of all this residuary property, and it was sold in their own lifetime. At least the long and persevering search of Mr. Jos. B. Stewart has failed to discover any part of it that was not so sold. The defendants, by giving in evidence the bill in chancery, nominally instituted in 1842 by Jeanet Clarke against Robert Dyson and Matthew St. Clair Clarke, but undoubtedly and on its face instigated by Matthew St. Clair Clarke himself, (Rec., p. 104,) have furnished us with proof of what became of

twenty-four valuable lots, in New York, lying between 5th and 6th avenues and 17th and 19th streets west, half of which belonged to said Jeanet Clarke and half to Matthew St. Clair Clarke's wife. They were lost in an insane speculation of Matthew St. Clair Clarke, and absorbed for the debts of Robert and Duncan S. Dyson. Partners in iniquity seldom remain long in harmony, and Matthew St. Clair Clarke had found his masters in the Dysons.

The unlimited power which Matthew St. Clair Clarke exercised over the minds of Jeanet, his sister-in-law, and her son, is fully explained by the copious evidence in the record. The first witness we examined was Mrs. Quinn, formerly the wife of G. A. D. Clarke, and the mother of the appellants. A witness standing in such a relation to the parties to a suit may justly be supposed to be biased; but, after having examined the whole testimony, (Rec. p. 39,) we believe that the court will come to the conclusion that this witness stated her recollections with reserve and dignity, and under a full sense of the solemn obligations of an oath. Not a word of her deposition is contradicted by any other part of the evidence in the record. We need not give her testimony concerning the age of her husband, or his death, or the age of her children, which is not questioned by the other side. She says that she was married to G. A. D. Clarke, at Cumberland, Maryland, in 1844, and proceeds thus: "When I married my husband, his mother was a widow, and resided with Matthew St. Clair Clarke, at Washington. Matthew St. Clair Clarke was the brother of her late husband, and his wife was the sister of Jeanet Clarke. Mrs. Jeanet Clarke resided with Matthew St. Clair Clarke from the time of the death of her husband until the time of her own death, with the exception of visits she paid to Cumberland during the summer months. Matthew St. Clair Clarke visited Mrs. Jeanet Clarke, at Cumberland, very often. I saw him there very often; he visited at our house. I know what business Matthew St. Clair Clarke had with Mrs. Jeanet Clarke; he

had charge of her entire business; he furnished her with money. Mrs. Clarke talked with my husband about the business very often. Mrs. Jeanet Clarke was exceedingly weak-minded—very childish; caused by sickness, I believe. Mr. Matthew St. Clair Clarke had great influence over her. When Matthew St. Clair Clarke proposed anything as to her property, she never resisted. I have seen him oftentimes come in with papers, and ask her to sign them. He would say to her, "Here, Jeanet, I want you to sign this paper; you need not read it; it is all right; I am in a great hurry." My husband used to remonstrate with her, and it always ended in her crying and saying that she could not do anything; if she did, Mr. Clarke would stop her support. Mr. Geo. Clarke never, to my knowledge, remonstrated with Mr. Matthew St. Clair Clarke as to his proceedings towards Mrs. Jeanet Clarke. G. A. D. Clarke had a great deal of respect and love for Matthew St. Clair Clarke, and at the same time a great deal of fear of him. After the death of his mother I would urge him to see and talk to his uncle, to see if we could not have some settlement of his mother's estate, as we needed means very much. I thought it very hard, if there was any property, that we could not get it. He replied by telling me that it was no use to talk to his uncle Matthew about the business; that he would not allow him to talk to him. After Mrs. Jeanet Clarke's funeral, her personal property, consisting of her clothing, jewelry, bed and bedding, were all distributed by Mrs. Matthew St. Clair Clarke to her poor relatives, without ever consulting my husband. I recollect when we were first married—it was in July—Mrs. Jeanet Clarke, at the solicitation of her son, asked Mrs. Matthew St. Clair Clarke to urge Mr. Matthew Clarke to have a settlement of their affairs, as she wished to give some money to her son to go into business. Mrs. Matthew Clarke was very much excited, and remarked to Mrs. Jeanet Clarke: If you do urge a settlement of your business, we will bring a bill, amounting to thousands of dollars, for carriage hire,

servants' attention, physicians' bills, and extras, which will ruin you, and make you a beggar. Mrs. Jeanet Clarke then said she would never ask a settlement again, and I don't think she ever did—not to my knowledge."

On the subsequent day (Rec. p. 49) this witness stated that when she was married to G. A. D. Clarke, he was teller of the Mineral Bank at Cumberland, at a salary of $1,000 a year, which situation he retained less than a year after their marriage; he then went to live with J. B. Kehler, the deponent's brother, who was a book-keeper and accountant at Cumberland, Maryland, where he remained a year or two; he then went to Washington, where for a year or two he endeavored to obtain a situation, during which time the deponent's father took care of her and her two children. G. A. D. Clarke afterwards, in 1851, obtained a clerkship in the Department of the Interior. The deponent heard that his mother, Jeanet Clarke, inherited property from her father, James R. Smith, from her earliest recollections. This seemed to be a common rumor—it was understood in Cumberland that she was wealthy. "I think that the first time I ever heard Mr. Clarke say that his mother or grandfather had property in New York was in 1844, and was urging her to have a settlement with Matthew St. Clair Clarke. He never said anything to me about the character of that property, as to whether it was personal or real estate. He never mentioned that Mr. Matthew Clarke had anything to do with the business, except that he paid Mrs. Jeanet Clarke money.

The only reason why Mr. Geo. Clarke urged Mrs. Jeanet Clarke to have a settlement was because, as I understand, Mr. Matthew Clarke gave her money. I was only between fifteen and sixteen years old, and did not know what an executor meant. I never knew that Mr. Boorman was an executor in the case until Mr. Janin was employed in this suit. I have positive knowledge while in Washington Mr. Clarke urged his mother to make this settlement. I am not positive that anything occurred after that. After my marriage, I

think Mrs. Jeanet Clarke made me two visits in Cumberland, which visits lasted a few weeks, except one she made in the winter months, which lasted a month or six weeks. My husband was at home when Mrs. Clarke visited there. I knew that Mr. Matthew Clarke had charge of Mrs. Jeanet Clarke's business only from the fact of his giving her money, and constantly bringing her papers to sign, and from common report. I know of instances of Mr. Matthew Clarke's bringing papers to Mrs. Clarke to sign in Cumberland. I was not present at several interviews in regard to signing any papers, except at Cumberland, all at Mr. Clarke's house. *Mr. Geo. Clarke was not present at any of those interviews.* My father and mother were sometimes present at these interviews, and my brother who is now deceased."

The same witness having previously stated that Mrs. Jeanet Clarke was very childish and weak-minded, she answers to a cross-interrogatory as to why she said so, that "she used to keep dolls and dress them as she would a baby. She seemed to have a perfect mania for quilting quilts, and as soon as they were finished, having them all ripped out and quilted over by a seamstress. It used to annoy her very much for the servants to ask her to loan them her clothing. She dressed very handsomely. She used to shed tears, and seemed to be very much distressed that I would allow them to annoy her in that way. From her general conduct I knew her to be very childish, and advantage was taken of it. I was married on the 5th of June, on Wednesday, and on the following Saturday I met Mrs. Jeanet Clarke at the house of Mrs. Jane Smith, in Newark, New Jersey, (her brother's house,) and almost before speaking to me she asked the prospect of an heir or heiress, whatever it was."

This witness further states that when her husband remonstrated with his mother for not obtaining a settlement from Matthew St. Clair Clarke, the reason she assigned for not trying it was that she was afraid of her support being stopped

if she did, and that Matthew Clarke always told her to keep quiet and she should be taken care of.

This witness explains what sort of a man Matthew St. Clair Clarke was, and how he exercised so great an influence over his sister-in-law and nephew by say that "he was one of the kindest and best-hearted and most affectionate of men. He was a man of such superior mind. He was one of the most affable and pleasant gentlemen. At the death of a little child I had, about 22 or 23 months old, he held the child while it was dying, his kind and affectionate manner mitigating the distress in a great measure."

She further says that the information contained in the original and amended bills filed in this case was obtained from Mr. Jos. B. Stewart.

C. M. Thurston, of Cumberland, Allegany county, Maryland, (Rec. p. 68,) 70 years of age, was acquainted with Jeanet Clarke—she was of feeble mind. The witness was also acquainted with Matthew St. Clair Clarke, "who was a man of brilliant character and capable of exercising great influence over persons with whom he was associated. He could exercise great influence over Jeanet Clarke at any time I knew her." This witness further says that he was very well acquainted with George A. D. Clark, the son of Mrs. Jeanet Clarke. "His mind was very irregular, weak in fact. I knew him seven or eight years. He was a clerk at the Mineral Bank at Cumberland, of which I was the president. His uncle, Matthew St. Clair Clarke, always exercised great influence over him. He was always bare of money, and had nothing more than the salary he got from the bank." The witness knows that while G. A. D. Clarke resided at Cumberland, Matthew St. Clair Clarke was often there. The witness inferred, from his conversations, that it was only through his mother that he expected any estate from New York. "George A. D. Clarke came to the Mineral Bank about 1840. He was appointed teller, and remained in that position four or five years. His duties were

receiving money, entering it in the books of depositors, and giving general assistance to the cashier. It was a position of responsibility. He was not a capable and efficient officer. He remained at Cumberland for some time after he left the bank, not being engaged in any business. I discovered, during the first year, that he was not an efficient officer, and kept him because I could get nobody else."

John T. Edwards, also a witness examined at Cumberland, Maryland, (Rec., p. 69,) knew Jeanet Clarke for several years, and considered her a woman of rather weak mind, and that she seemed to be under the influence of Matthew St. Clair Clarke, as far as he knew.

Dr. James M. Smith, another Cumberland witness, (Rec., p. 70,) says that he was the physician of Mrs. Jeanet Clarke during the time that she was at Cumberland. She was a very frail woman when she came there, and had evidently been sick for a long time. She always spoke of Matthew St. Clair Clarke with great deference. The witness knew George A. D. Clarke, who was very much like his mother—of about the same mental calibre.

John H. Kehler, a witness examined at Denver City, Colorado Territory, (Rec., p. 77,) declares that he is 73 years of age, and a clergyman of the Protestant Episcopal Church; that he is the father of Mrs. Quinn, and the grandfather of the appellants; that he knew Jeanet Clarke, the mother of George A. D. Clarke. First saw her at Cumberland, Maryland, whence she removed to Washington city, and resided with her brother-in-law, Matthew St. Clair Clarke, with the exception of visits she paid to her friends. Matthew St. Clair Clarke had the entire financial management of the business of Jeanet Clarke. "Jeanet Clarke was a very weak-minded woman, caused chiefly by sickness, and, on account of her great imbecility of mind, I did not consider her competent to sign any important papers or to transact any business of any kind whatever. The said Jeanet Clarke did not attend to her interests in the estate of her father, James R.

Smith, herself, but left it to the sole management of the said Matthew St. Clair Clarke, brother of her late husband. * * * The said Jeanet Clarke had great confidence in one man in connection with said business; that man was the said Matthew St. Clair Clarke, who exercised great influence over her. For example, I have seen him come into the house, seemingly in a great hurry, and say: 'Here, Jeanet, is a paper I want you to sign; don't ask me any questions; I am in a great hurry; it is all for your good;' when she would sit down and sign without reading a word of it. I am of the impression that the said Jeanet Clarke had not sufficient intelligence and independence of character to liberate herself from that influence, and for the reason that she was in very bad health, her mind was very weak indeed, and she seemed to be in great dread of the said Matthew St. Clair Clarke. She seemed to think that her support and maintenance depended solely upon said Clarke, and to fear that he would withhold it."

This witness knew George A. D. Clarke from 1844 up to his death in 1855, and as said Clarke was the husband of the daughter of the witness, his intercourse with him was very intimate. Clarke, he says, evidently knew that he was entitled to something under the will of his grandfather, but his ideas were very vague as to the amount and value of said property. The said George A. D. Clarke had not the pecuniary means to investigate his rights under said will, or to travel from Washington city to New York for that purpose, as it required his whole salary to support his family. He seemed to be under the influence of and dependent upon his uncle, Matthew St. Clair Clarke, whose displeasure he dreaded, for fear that he would withhold his mother's support.

T. P. Shaffner, a witness examined in New York city, (Rec., p. 71,) first became acquainted with G. A. D. Clarke in Cumberland, Maryland, and in the years 1840, 1841, 1842, and 1843, saw him daily. They were both great Free

Masons and Odd Fellows, which brought them much together in the most confidential relations. This intimacy continued up to Clarke's death, which occurred when this witness was in Europe. He knew the wife, children, and mother of said Geo. A. D. Clarke very well. The mother was a woman of kind disposition, but as to intelligence an imbecile. She required the closest nursing, and was incapable of doing any business. Geo. A. D. Clarke was the most eccentric man, and known as such in the town of Cumberland. He had a remarkable memory on some subjects. He was remarkably well informed upon the Bible and the use of figures, but in business affairs, especially in reference to his own, he was as weak as his mother.

"Between 1840 and 1843 he received his salary from the bank, besides some compensation from the lodges for his support, and I am not aware that he received anything from his mother, as her own means were very limited. He was constantly, at my suggestion, and at that, I suppose, of other persons, urging his mother to have a settlement of her property or of her rights with Matthew St. Clair Clarke, who seemed to control the matter as he pleased, and G. A. D. Clarke, although he made repeated efforts to obtain information respecting her property, was unable to obtain it. My intimacy with G. A. D. Clarke continued during the latter period of his life, and throughout his life, and whenever I visited Washington city, to gratify him I gave him an evening to consider and advise with him as to his condition, he then being very poor. His expectations had reference only to the property of his mother, with this exception, that when I saw him in 1855 he spoke to me about some property lying in New York; he had been informed that he was one of the heirs, but did not seem to know much about it; he offered to employ me as his lawyer to examine into it, and attend to it for him, and was willing to give me any fee that I required. He was not able to give me information enough to work up the case, nor to find out anything, but I

promised to employ a lawyer here for him, and he, Clarke, was to give this New York lawyer further information. On my return to New York I employed Robert D. Holmes, who was my general lawyer at the time. In March, 1857, Holmes told me that he had corresponded with Clarke, but that Clarke never was able to give him any more information than what I had given him, and that he was unable to pay him a fee, or to pay for the necessary search."

In answer to the question, "Can you recollect in a general way what information you gave to Holmes about the case?" the witness, Shaffner, replies: "I do not recollect what it was, but it was very little, as Clarke could not tell me anything more than that he had recently heard that he was an heir to some property lying in New York from his ancestors. He could not refer me to any documents. He said he had got the information referred to above from a letter that some one, whom he possibly named, had written to him. He had never seen any will or other legal documents, and could not refer me to any, but supposed they were on record here. I never saw any will."

This witness had no personal knowledge of the influence which Matthew St. Clair Clarke exercised over Mrs. Jeanet Clarke; he only knew it from the statements of G. A. D. Clarke, and of all the friends of the family. "It was generally known and believed."

After this review of the parol testimony explaining the personal relations of Jeanet Clarke and her son, G. A. D. Clarke, with Matthew St. Clair Clarke, we shall proceed to the consideration of the documentary evidence relating to the same subject. This will be found in documents 3, 18, and 25, and A of the stipulations of parties filed in this case. It appears by document No. 25 (Rec., p. 250) that already in June, 1824, in the lifetime of her husband, Jeanet was indebted to Matthew St. Clair Clarke, and then jointly with her said husband executed a deed authorizing Matthew to retain in his hands, to satisfy his demands, money coming to her from her father's estate.

On the 25th of June, 1829, Jeanet executed a power of attorney (Rec., p. 168) to Matthew St. Clair Clarke (No. 3) to divide, select, apportion, and set apart the estates of James R. Smith and Hannah his wife, in conjunction with the other heirs, and to accept for her (said Jeanet) such division or allotment of said estates as he might select * * * * * "and to receive and accept for me all such deeds, receipts, or other writings, as shall be made by the other heirs or any other person, for the purpose of effecting a division of both said estates among the heirs *without the injury which would accrue were the same all converted into moneyed instruments.*"

Another deed by Jeanet Clarke (Rec. p. 221) in favor of Matthew St. Clair Clarke, dated May 13, 1830, (No. 18 of the stipulation of parties,) is of an extraordinary and unheard of character. It is partly a deed of trust, a power of attorney, and a testament. It provides that, for the purpose of reimbursing to Matthew St. Clair Clarke the sum of $2,241.06, with interest from the first of October last, the said Jeanet had sold, aliened, &c., to said Matthew St. Clair Clarke, all her part and interest in the estates of her late father, James R. Smith, and her late mother, Hannah Rogers—*all which estate will fully appear by the settlement of the heirs of the said James R. Smith, deceased, and Hannah Rogers, made in October last*—in trust for the following uses, interests, and purposes, to wit: to sell and dispose of the same, as he, the said Matthew, may deem fit, and in his own name as trustee, or in my name, as he may choose, to make conveyances, &c., * * * or to rent and lease the same, *and to do all other acts necessary for the entire control, management, and disposal of said estate as I myself could do,* and upon the further trust, that he may pay himself the said sum of $2,241.06, with interest, as above said, either in money or *by part of the real estate in the city of New York, conveyed to me as part of my mother's estate, or out of the one-third part of my father's estate, conveyed to me by his executors,*

taking the same at the valuation made before the division of said estate; and also that the proceeds of the sale of the whole of the remainder he shall appropriate as I shall direct during my lifetime; and, in case of my death, leaving my son George Augustus under the age of twenty-one, that then the proceeds (not confining himself merely to the income or interest when in his opinion it is necessary) or so much as he may think proper, he shall expend on him, the said George Augustus, in his maintenance and education, and *in case the said George Augustus should die before he arrives at the age of twenty-one years, and without lawful issue at the time of his death, then the whole of the estate remaining, which is held by me for one-third of my father's estate, and that held by me by the division of my mother's estate, whether real estate or in moneys raised therefrom, shall be held in trust by him, the said Matthew, for the use and benefit of my sister Anna Rhea Clarke, his wife and her children, with powers of sale and appropriation as he may direct; and upon this further trust, that upon the like contingencies respecting me, the said Jeanet, and the said George Augustus, as above menticned, then this whole of the two-thirds of my estate, as designated in said division, and conveyed to me by deed from Robert Dyson as remains undisposed of, shall be disposed of by said Matthew according to the terms of the will of my father, James R. Smith, said Matthew not to be held responsible* for any part or portion of said two-thirds, but such as shall remain in his hands at the death of said George Augustus without issue, as aforesaid; said Jeanet, however, retaining the power, nevertheless, to alter and change said last-mentioned trust of the remainder of said two-thirds unexpended; and, further, that, for his care and trouble, said Matthew shall and may retain a reasonable compensation, if he pleases so to do.

This instrument is so remarkable, that we think it proper to arrest the narrative of the evidence for the purpose of at once claiming the attention of the court to the principal points.

1st. It gives to Mathew St. Clair Clarke the most absolute control over all the property of Jeanet Clarke.

2d. It provides that he shall pay himself the sum of $2,241.06 which she owed him, either in money or by part of the real estate in the city of New York, conveyed to her as part of her mother's estate, or out of the one-third part of her father's estate conveyed to her by the executors, *taking the same at the valuation made before the division of said estate.*

So this debt was to be paid exclusively out of that property of which she had the absolute disposal, and he, Matthew St. Clair Clarke, was to have the exclusive advantage of the then rapid rise in the value of real estate in the city of New York.

3d. The remainder of that estate, of which she had the absolute control and ownership, was conveyed, in case of her death, to the said Matthew St Clair Clarke, in trust for his wife and her children.

4th. The remaining two-thirds, of which she only had the life estate, but the fee of which was really in her son, she directed to be disposed of according to the will of her father, the testator.

Thus Matthew St. Clair Clarke avoided, in the provisions contained in this paper for his own benefit and his family, all contact with those reserved two-thirds. Jeanet excluded her son from all participation in property she had a right to dispose of, and left to him only what the testator's will had left to him, and what was not her own.

Does it require any argument to show that such doings, under the well-established relations of Jeanet Clarke and Matthew St. Clair Clarke, bear before a court, sitting in equity, the impress of self-confessed fraud?

One of the provisions of that instrument, which was not dependent upon the death of Jeanet Clarke, was carried into effect by a deed of Jeanet in favor of Matthew St. Clair Clarke, dated July 13, 1830, which is No. 25 of the stipula-

tions of the parties. (Rec., p. 250.) In this deed it is declared that, whereas on the settlement of the estate of the late James R. Smith, the said Jeanet Clarke became indebted to Matthew St. Clair Clarke for moneys advanced to her by him in the sum of $2,241.06, with interest from the day of settlement, to wit, the first day of October, 1829; and whereas, on the 29th day of June, 1824, the said Jeanet Clarke, with her then husband, John X. Clarke, now deceased, did authorize the said Matthew, by their sealed instrument of writing, to retain in his hands as executor of James R. Smith, deceased, as much money as would satisfy him for all moneys which the said Matthew might pay for them on their account; and whereas, by deed of May 13, 1830, the said Matthew was authorized to pay himself out of the real estate of said Jeanet, and the said Matthew has elected to do so, and the debt then amounted to $2,346.73, the said Jeanet Clarke had sold and transferred to Matthew St. Clair Clarke a number of lots in the city of New York.

These lots were of course conveyed at the valuation put upon them at the partition of October 21st, 1829, though this is not mentioned in the deed. Of course no account was taken of the then probably increased value of this city property.

The last document we shall examine on this subject is document A, offered by the defendants below. (Rec., p. 104.) It is a very voluminous bill in chancery, filed in the name of Jeanet Clarke in the court of chancery of the State of New York in 1842, and sworn to by her, the imbecile, on the 22d of January, 1842. This bulky paper was offered at the oral trial; his Honor Judge Blatchford had already set aside for two days the regular business of his court to hear this case in consequence of the inability of the circuit judge to sit in it. The writer of this paper, conscious that nothing proceeding from an official authority could be prejudicial to his case, and unwilling to claim more time of the circuit court

than it had been willing to appropriate, made no objection to this document, and never read it then ; nor did the counsel for the defendants, who only said that it was offered in refutation of the allegations of the bill, that Matthew St. Clair Clarke exercised irresistible influence over Jeanet Clarke, since this bill was brought by her against Matthew St. Clair Clarke. The writer has read this bill only since the oral trial, and regrets that the defendants did not produce everything else that was filed in that suit. But as the other parts of that record were withheld, he must conclude that they were unfavorable to their cause ; and as he could not compel their production, he must be permitted to comment upon that bill. It is most perspicuously drawn ,and signed by D. D. Field as counsel and Theodore Sedgwick as solicitor. But we charge that Matthew St. Clair Clarke directed it. Familiar as we are with his doings, we say that in this bill *loquitur* Matthew St. Clair Clarke, though it was apparently directed against him. He had compromised important property belonging to Jeanet Clarke, and wished to get it back, and he was sure that when he got it back he would put it to better use. Now this might have appeared obscure to the court of chancery, but as this Court is well informed concerning the relations of Matthew St. Clair Clarke and Jeanet Clarke, this will be found to be as evident as if Matthew St. Clair Clarke had affixed his signature to it.

The account which Jeanet Clarke, or rather Matthew St. Clair Clarke gives in this bill of their mutual business relations, agrees very closely with the account we have deduced from the other evidence in the record. The bill begins by setting forth the contents of the will of James R. Smith in favor of the complainant, Jeanet ; that a certain portion of this property should, after his death, be enjoyed by her husband if he survived her, "*and as long as he should live, and after his death it should go to the child or children of the said daughter.*" Then come allegations concerning the

estate of the widow of said James R. Smith, afterwards the wife of John B. Rodgers, and mother of the complainant. These matters relating to the estate of the mother having no bearing upon the present suit, we shall not mention them any more.

The bill then proceeds to say *that on or about the 31st of October, 1829, a partition of the real estate of James R. Smith took place between his heirs.* We beg leave to suspend here for a moment the reading of Jeanet's bill, for the purpose of drawing the particular attention of the Court to the allegation therein, that a partition in kind of the real estate had taken place between the heirs of James R. Smith. This partition is a most important feature in the present suit. Our own original bill distinctly alleges it to have been made by an agreement in writing, on the 21st of October, 1829. (See p. 10 of our printed bill.) The answer of the executor denies that either in the papers of Boorman, or those of Radcliff, there is any agreement in writing for the valuation of the real estate after the payment of debts. The existence of this agreement is a material fact to be proved, as it operated a division in kind, whereas Boorman and the defendants below always pretended that the deed executed by the executors and heirs to Robert Dyson of all the remaining property, dated December 26, 1829, and immediately followed by the reconveyance of the same property in three divided shares to the three daughters, was, in reality, as its terms imply, a real sale for cash, whereas we have alleged and contend that it was a disguised mode of carrying out the agreement for a partition in kind, previously prepared and signed, though never put on record, the object of the parties thereto being to conceal the origin of the title of said property, as subject to the rights created by the will of James R. Smith, and by such concealment to induce innocent parties to buy the same.

The existence of this preliminary partition is, however, fully proved by various deeds, bearing the names of the ex-

ecutors, and of all the children of James R. Smith. In the two deeds by which Jeanet and Elizabeth Duncan received from the executors and their co-heirs lots in payment of their share in the sum of $14,652.22, in which the estate of James R. Smith had been calculated to be indebted to the estate of Hannah, his widow, and afterwards the wife of John B. Rodgers, (Rec., pp. 177, 185,) it is set forth that, *whereas the said parties of the third part have agreed to take for said debt certain lots of ground in the city of New York at a fair valuation; and whereas by agreement in writing by all the heirs of said James R. Smith and said Hannah Rodgers, dated the 21st of October*, 1829, *said valuation was made by James Boorman, Thomas Suffern, and Robert Lyson, Esq., of all the lots of ground belonging to the estate of James R. Smith; and whereas from said valuation the said party of the third part has selected the hereafter described lots in full payment as aforesaid, &c., &c.* The other two deeds (Rec., pp. 193, 202) by which the same grantors convey to the said Jeanet Clarke and Elizabeth Duncan and Joseph B. Duncan, her husband, the one-third part, over which they had absolute control, of their respective fourths of the estate of James R. Smith, which that testator had devised in trust for them, contain the following averments in relation to the then estate of James R. Smith:

"*And whereas the debts of the estate are all paid*, and the residue of said estate consists principally in real estate; and whereas the said daughters of the said testator are now desirous to appropriate their respective one-third parts of the said estate, and the executors are willing that they shall do so; *and whereas it is universally admitted by all the said heirs and devisees, that a sale of said estate to convert it into money would be very injurious to all concerned;* and whereas by agreement among said heirs, *the whole of the said real estate has been parted, divided, and valued in four distinct and equal parts,*" &c., &c. And then comes the conveyance of lots in satisfaction of the above described claim.

The four deeds from which the above extracts are taken were

all executed on the 15th of November, 1829. They are Nos. 6, 8, 10, and 11 of the evidence of the plaintiffs below, according to the stipulations of parties. (Rec. p. 103.)

Another deed of the same date, which is No. 12 of the evidence of the plaintiffs below, is the conveyance by the executors and the other heirs to James C. R. Smith, of his entire share in the estate. (Rec. p. 197.)

This deed recites: "Whereas the said party of the third part is over the age of twenty-five years, and is entitled to demand from said executors his one-fourth part of said estate; and *whereas the residue of said estate, after having paid the debts by sale of part*, is principally in real estate, and the said second and *third parties are desirous to avoid the sacrifice which would follow the sale of said estate by the executors, and the said second and third parties hereto, by universal consent, have parted and divided and valued said estates in four equal parts in kind, as by reference to articles of agreement dated first of October*, 1829, *will appear*," &c., &c. And then follows the conveyance of the property set apart for James C. R. Smith. After the withdrawal of the one-fourth bequeathed to the son, the remaining estate was composed of the two-thirds of the three-fourths devised in trust for the grandchildren, subject to a life estate in their mothers. For the purpose of enabling the mothers to defraud their own children, this property was transferred to them, but not with a recital of its origin, as in the case of the son, but an absolute deed of sale in fee was executed by the executors and heirs to Robert Dyson, nominally for $64,710 39, paid in cash into the hands of Matthew St. Clair Clarke. This was done on the 26th of December, 1829, and on the same day Robert Dyson executed conveyances of this entire property to the three daughters of James R. Smith and the surviving husband, of two of them. These were also nominally cash sales, and, like the sale to Dyson, professed to transfer the fee. To set at rest any further remarks concerning the real nature of these transactions, we transcribe here the respec-

tive amounts for which Dyson professed to sell the three parcels, viz:

Sale to Matthew St. Clair Clarke and wife....	$21,614 56
Elizabeth and Joseph B. Duncan	21,522 70
Jeanet Clarke.....	21,573 13
	$64,710 39

To a cent the amount for which he professed to have purchased the same property on the same day. These four deeds to and from Dyson are Nos. 14, 15, 16, and 20 of the stipulations.

After this long digression, we return to the bill in chancery of Jeanet Clarke. (Rec., p. 104.) We have already seen that she states in that bill that on or about the 31st of October a partition of the estate of James R. Smith took place between his heirs, and the oratrix then refers to a paper annexed to the bill and marked C. (Rec., p. 129.)

Jeanet's bill further proceeds to say, that by said agreement it was declared, that the amount coming to her and her sister Anna Rhea Clarke under the will of their mother, was to be paid by a transfer of lots from the estate of James R. Smith. By virtue of said partition, a portion of a property known in the city of New York as the John Kerr lot was conveyed to the oratrix in fee, as the one-third part in the share due to her under the will of the said James R. Smith, and other lots in said city, and other parts of the said John Kerr property, were also conveyed to her in fee as the two-thirds of the property coming to her under the will of James R. Smith. And again other lots, part of said John Kerr property, were conveyed to her for her share of the amount due by the estate of James R. Smith (her father) to the estate of Hannah Rodgers, (her mother;) that by virtue of the partition and agreement aforesaid, the other parts of the estate of James R. Smith and certain lots, part of the said John Kerr property, were conveyed to her sister, Anna Rhea Clarke, the wife

of Matthew St. Clair Clarke, in satisfaction of the same rights, for which the oratrix had received the abovementioned conveyances, the interest of the oratrix Jeanet and her sister Anna Rhea Clarke being the same.

That in making the partition of said property and in settling the accounts of the estate of J. R. Smith, and Hannah Rodgers, Robert Dyson, merchant of the city of New York, acted as the agent of Matthew St. Clair Clarke or of the *oratrix*, or of the estate of Jas. R. Smith generally; that he was one of those who made the valuation of the property of said estate; and that he was familiar with the business of said estate, and the interest of the oratrix and her sister in the same.

That on the first of October, 1829, the oratrix was indebted to Mathew St. Clair Clarke in the sum of $2,241.06.

The oratrix, Jeanet, further proceeds to say, that as she had for many years past been an invalid and in a very great degree, so as to render it almost, if not quite, impossible for her to attend to any business whatever, she was desirous of placing the property out of her own hands for the purpose of relieving herself of all trouble and fatigue in the management of it; and that she had perfect confidence in her brother-in-law, Matthew St. Clair Clarke, and selected him for that purpose; that on May 13, 1830, in consequence of the aforesaid indebtedness, and also, for one dollar in hand paid, and to carry into effect her object already stated, she, by indenture, conveyed to Matthew St. Clair Clarke all her estate arising out of the estates of her said father and mother, as would appear by the settlement of the heirs of October, 1829, in trust, to sell and dispose of the same in his own name as trustee, or in the name of the oratrix, and upon the further trust to pay himself the aforesaid sum of $2,241.06; and, in case of her dying, then to provide for the maintenance and education of her son, George Augustus Clarke; and, in case of his dying under the age of twenty-one and without issue, then her whole estate should be held by the

said Matthew St. Clair Clarke in trust for his wife, Anna Rhea Clarke; that on the 13th of July, 1830, she sold certain lots of ground to the said Matthew St. Clair Clarke in payment of her aforesaid debt of $2,241.06; in consequence whereof, the balance of what she had conveyed to said Matthew St. Clair Clarke on May 13, 1830, remained free, and particularly all her lots in the said John Kerr property; that, in 1835, the said Matthew St. Clair Clarke negotiated a sale of said lots, conveyed to his wife and the oratrix, which had greatly risen in value; that these negotiations were carried on through Robert Dyson as the agent of Matthew St. Clair Clarke, who, about the 27th of March, 1835, concluded a bargain with William H. Leroy. Her own lots were conveyed by said Matthew, in his own name and as trustee, and by herself, to William H. LeRoy for $30,000, (this is deed No. 17 of the evidence of the plaintiffs below, Rec., p. 216,) and embraced twenty-four lots in the Twelfth ward, between Fifth and Sixth avenues and Seventeenth and Nineteenth streets. On the same day a similar conveyance was made to William H. LeRoy of lots belonging to Anna Rhea Clarke, the wife of Matthew, also for $30,000. On these two sales, amounting together to $60,000, $10,000 were paid in cash, and LeRoy gave to Matthew, for the remaining $50,000, a mortgage, which was recorded at the instance of Dyson as agent. Of this mortgage, one-half, or $25,000, belonged to the oratrix, and it was not competent for him to dispose of the same without the consent of the oratrix.

The bill further alleges that, in 1835, or before, George W. Bruen, Harmon Bruen, and John Bloodgood, were largely indebted to the United States. About the 15th of May, 1835, Mathias Bruen, of Perth Amboy, and Alexander M. Bruen, gave a power of attorney to Matthew St. Clair Clarke to compromise with the Secretary of the Treasury, and for that purpose authorized him to sell, or contract for the sale of about three hundred lots in the city of New York, between Seventeenth and Nineteenth streets, First avenue,

and the East river, provided that they should not be sold for less than was sufficient to effect a compromise with the United States, said Matthew being authorized to retain, for his services, whatever balance the sale of these lots might leave, after the satisfaction of the claim of the Government. Matthew St. Clair Clarke effected a compromise with the Secretary of the Treasury, conditioned that he should pay two hundred thousand dollars. Not having the requisite amount of money, and, anticipating much benefit from this transaction, Matthew, entered on the 7th of July, 1835, into an arrangement with Robert Dyson and his brother, Dunbar, partners in the commercial firm of R. & D. S. Dyson, established in the city of New York, to the effect that Alexander N. Bruen should convey to Dunbar S. Dyson, the property described in the aforesaid power of attorney; that Dunbar S. Dyson should pay to the United States the said sum of $200,000, or satisfactorily secure the same to be paid; that $25,000 should be charged to the general fund to be raised out of said lots; that the said sum of $200,000 should be repaid out of it by the sale of said lots, with proper interest, and that the remainder of said proceeds should be divided between the said Matthew St. Clair Clarke, who was to receive two-thirds, and the said R. & D. S. Dyson, who were to receive one-third thereof; and by a further agreement between the said parties, the said premium of $25,000 was to be divided between the same parties in the same proportion, to wit: Matthew receiving two-thirds, and the said R. & D. S. Dyson one-third thereof.

The bill further shows that Matthew entered into the said agreement with the partnership of R. and D. S. Dyson, but there was to be no partnership between himself and that partnership, and the said Matthew was to contribute no part of said sum of $200,000, the whole of which was to be advanced by the said R. and D. S. Dyson, at their own risk and on the security of said lots.

That on March 10, (the year is not stated in the copy on

file in this case,) Virgil Maxey, then the American Chargé d'Affaires in Belgium, became interested in said transaction with said Matthew, who on that day executed an instrument declaring that said Maxey was equally interested with him in said bargain, and agreeing to pay over to him one-half of the profits of the said two-third interest, or to convey to him one-half of the lots to be set apart for him the said Matthew, or to assign to him the same proportion of bonds for lots sold.

That accordingly, on July 7, 1835, the said Alexander M. Bruen, by George W. Bruen, his attorney, sold to said Dunbar S. Dyson, the aforesaid property in the eastern part of the city of New York, which is fully described in the bill. Mathias Bruen sold at the same time his interest in said property to said Dunbar S. Dyson, who thereby acquired the legal title to the whole of it, he being alone selected for that purpose, because at that time he was not married.

That thereupon the said R. and D. S. Dyson gave their obligations to the Treasury of the United States for the said sum of $200,000, payable in three instalments of $66,666.66 each, on the 14th of August, September, and October, 1835, which obligations were paid by them. But they could not make this settlement without incurring heavy liabilities; they could not sell the lots, and being sorely pressed, they called upon Matthew St. Clair Clarke for assistance. On August 17, 1835, Robert Dyson wrote to Matthew St. Clair Clarke, representing his urgent necessities and great embarrassments, and concluding: "You must stand ready to use the $50,000 mortgage and take the like upon the Bruen purchase in case of need." Matthew went to New York, and yielding to the pressure of R. and D. S. Dyson, executed to their use an assignment of the $50,000 bond on September 13, 1835. On October 21, 1835, R. and D. S. Dyson obtained a loan of $50,000 on this mortgage, from the American Life Insurance and Trust Company of New York, and assigned the mortgage to that company. All this was done

in the name of Robert Dyson alone, but really for the benefit of R. and D. S. Dyson: and said assignment was in direct violation of Matthew's duty as trustee for the oratrix, which was well known to the Dysons.

That Matthew did not immediately require the mortgage agreed upon, because he daily expected the sale of the lots and the reimbursement of the $50,000. However, on November 22, 1837, he applied to said Dysons for the execution of the mortgage; but this was refused, and all further efforts for a settlement were fruitless.

That the Dysons conveyed or mortgaged a large portion of said property to third persons for cash or in settlement of their debts, and unless restrained by the court would put all said property out of Matthew's reach, and the oratrix would be remediless. The oratrix further charges that the conveyances and mortgages executed by the Dysons were in great part colorable and made to defeat the oratrix and other creditors, and that the said Dysons confederated with Virgil Maxey and the said Matthew St. Clair Clarke, the latter of whom should therefore be removed from being her trustee, and another trustee appointed in his place.

Therefore the oratrix prayed that the said D. S. Dyson be decreed to execute a mortgage on the Bruen property for $50,000, the interest of the oratrix therein being declared to be one-half; that if said mortgage could not be given, the said D. S. Dyson be decreed to pay to her $25,000; that if the Dysons had not sufficient property, the said Matthew St. Clair Clarke be decreed to pay the deficiency, and that it be referred to a master to appoint a trustee in the place of said Matthew St. Clair Clarke.

The bill concluded with a prayer for an injunction to prevent the Dysons from alienating the Bruen property, and this was granted.

Although the bill was sworn to by Jeanet Clarke, it is self-evident that the only part of its contents that she knew well was "that she had for many years been an invalid, so

as to render it almost if not quite impossible for her to attend to any business ; that, for the purpose of relieving herself of all trouble and fatigue, she had placed her property out of her own hands, and having perfect confidence in her brother-in-law, Matthew St. Clair Clarke, she had selected him for that purpose."

Thus much of the bill we can believe to have been understood by Jeanet Clarke. Even a sick and weak-minded woman may be aware that she is suffering, and has interests which somebody else is attending to for her. That this was so we have abundantly proved by other evidence. As for the other allegations of that bill, we know enough about the case to say that in the main they may be true. *She* neither knew nor could understand them, or give instructions to counsel, and many circumstances were alleged of which no one but Matthew and the Dysons had any knowledge. This bill, no doubt, was invented by Matthew St. Clair Clarke himself, who, to produce a plausible illusion, had to ask for his own removal as trustee, and the appointment of another whom he could have managed as easily as he managed Jeanet. By the success of Jeanet in that suit he could again get into his hands $25,000 of her property, with which he had incautiously parted, besides, perhaps, benefitting his own wife by breaking down the fraudulent Dysons. To suppose that this nominal suit of Jeanet Clarke against Matthew St. Clair Clarke proves a cessation of the absolute dependence of Jeanet upon Matthew, shows, on the part of those making such an assertion, a very imperfect knowledge of the evidence in this case. We have shown that already, in June, 1824, in the lifetime of her husband, Jeanet was indebted to Matthew, and her husband dying very soon afterwards, she was received into the house of Matthew. The choice of Matthew as her agent was imposed upon her by her position, and no doubt by the importunities, gently administered, of Matthew himself. When the suit here spoken of was prepared and filed, she resided at the house of the

said Matthew St. Clair, and continued to reside there until her death, on the 5th of September, 1847.

We hope that we have satisfactorily shown by the evidence which we have been reviewing, that we have made out the case exhibited by the bill. In the next place we have to show what the answer is, and to prove that it does not impair the case established by our evidence. We shall, therefore, review the points made in the answer, and test them by comparison with the evidence in the case, and particularly by the authority of eminent law-writers and adjudicated cases of courts of high repute. On the subject of the only serious defence set up by the answer, to wit, "acquiescence and lapse of time," we shall not content ourselves with a mere reference to authorities, but transcribe several of them at length.

On minor points we shall content ourselves with references to the National Digest of the Messrs. Abbott, hoping that the Court will consider, with ourselves, that their excerpts are carefully and skillfully made, and knowing that the Court can at any time test them by the cases to which they refer.

And while thus answering the defendants, we shall divide our answer into distinct points, and collect under them the bearing of the testimony upon each point.

1. An obvious inquiry which would be made by a casual examiner of this case is, why the plaintiffs below did not proceed against the property which they allege was exclusively their own. The answer is, that in such an attempt they would undoubtedly fail, as the whole of it is possessed by *bona fide* purchasers. The will of Jas. R. Smith authorizes the executors to sell; the codicil makes legacies; there were, besides, debts, for even the richest merchant makes use of his credit. The executors were under the necessity of selling property of the estate to pay debts and legacies, and a proposed purchaser could not be expected to inquire whether a projected sale was made for the legitimate pur-

pose of paying debts and legacies, or whether it was made for the illegitimate purpose of cheating the remainder-man, and after the right of the executors to sell had ceased to exist; that is, after the payment of debts and legacies, and when nothing remained except what the testator called his "reserved estate;" that is, reserved from sale, and left in kind to his grandchildren in fee.

2. The answer says, that as to every claim arising out of the sale of a small amount of stock made by Boorman in 1861, the plaintiffs have complete remedy at law. It further alleges that this suit, if it could be brought at all, could only be brought by an executor or administrator of the estate of Jeanet Clarke.

We do not profess to understand this objection. We claim in the right of G. A. D. Clarke, in opposition to the claim made by Jeanet Clarke in her lifetime, to exclude him. We claim the delivery of a legacy exclusively composed of real estate in the State of New York, and real estate descends to the heirs. And if it is impossible to deliver to us this legacy in kind, we claim its representative or its value, and that in equity has the same character as the real estate itself. (Toller, 490.) We submit a few authorities:

2 Lomax on Executors, 746: "Courts of equity have jurisdiction in all cases to compel delivery of a specific legacy by the executor."

5 Blatchford, 525, 531: In order to deprive a court of the United States of jurisdiction in equity, because the remedy at law is plain, adequate, and complete, the remedy at law must be as efficient to the ends of justice, and its complete and prompt administration, as the remedy at law."

5 Blatchford, 170, Parsons *vs.* Lyman: "When a will appointed an executor and created a trust by saying: 'I devise and bequeath to my executor herein named, in trust, certain property'—held that the relation of the executor to the trust estate as trustee, was the same as if he had not been named executor in the will, and as if the property had

been devised and bequeathed to him in trust by his individual name."

In his third point the learned counsel for the defendants below said that the devise to G. A. D. Clarke was a contingent remainder, which did not descend to his heirs, but to his personal representatives, and that therefore this suit should have been brought by his executors or administrators, and not by his heirs.

To this we reply again, that we are entitled to and claim the real estate in kind which was fraudulently sold by the executors to Dyson, and by him to Jeanet; and that if this legacy cannot be delivered to us we claim its value, which represents the real estate. In Seymour *vs.* Freer, 8 Wall. 214, the Supreme Court of the United States say: "Equity considers that as done which is agreed to be done. Money which according to a will or agreement is to be invested in land, is regarded in equity as real estate, and land which is to be converted into money, is regarded as money and treated accordingly." Contise's adm'r *vs.* Brown et al., 6 Paige, 448.

It will be remembered that the property here claimed is designated in the testator's will as his "reserved estate," over which his daughters shall not have absolute control, and which is "to be kept separate and distinct." Here we may copy with propriety an apt quotation on the 7th page of the brief below of our honored adversary: "Indulgences in rhetoric and the use of unnecessary words may be more properly imputed to the testator than a departure from what must have been the leading object of the instrument." Per Bartley, C. J., in Bank of Columbus *vs.* Hind, 3 Ohio State Rep., N. S., p. 18.

Furthermore, this objection to the capacity of the parties instituting this suit, is not in its proper place and shape. The 39th rule of the rules of practice established by the Supreme Court of the United States for the courts of equity of the United States, commences in these words: "The rule

that if a defendant submits to answer, he shall answer fully to all the matters of the bill, shall no longer apply to cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties or matttes of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar."

In Narman *vs.* Bradley, 9 Wall., 394, it was declared by the Supreme Court of the United States that an objection to the legal capacity or standing in court of a representative plaintiff must be made by a plea in abatement or a special plea in bar.

3. The answer alleges that the will of Jas. R. Smith authorized his executors to appoint an agent. This is a power every executor has, but he is responsible for the acts of his agent. The agent selected in this case did not sign the fraudulent sale of December 26, 1829, of which we complain, though he prepared it. (No. 24.)

4. The answer also alleged, as we had done ourselves in our original bill, that the testator, James R. Smith, had directed by the last article of his codicil "that his executors, their respective heirs, executors, and administrators, should be charged and chargeable only, every one of them for and with his or her own receipts and payments, acts and willful defaults, and not otherwise, and should not be charged or chargeable with, or for any sum or sums of money, other than should actually and respectively come to his or her hands by virtue of said will, nor with, or for any loss or damages which may happen in or about the execution of all, or of any of the trusts by said will in them reposed, without his or their respective willful default."

But the plaintiffs, anticipating this plea, also charged in their bill, and now repeat, that this provision of the last article of the codicil of said James R. Smith "did not secure

to said Boorman absolute immunity for anything his co-executor, Matthew St. Clair Clarke, might do, and what he could do only by and with the connivance of said Boorman; that it is evident that your orator and oratrix, and their deceased father, would have received the share of property bequeathed to them by the said James R. Smith, but for the willful default of said James Boorman in conniving at the fraudulent and simulated sale of the remainder of said estate to said Robert Dyson, which enabled the said Jeanet Clarke, through her agent, the said Matthew St. Clair Clarke, to hold herself out to the world as the owner in fee of the property in which her son had a residuary interest, and to dispose of the same in such a manner that neither her said son or your orator and oratrix have ever derived the least advantage from the said bequest of the said James R. Smith."

That Boorman is responsible to the plaintiffs, although the deed to Dyson alleges that he received no part of the price, (which we more readily believe, as nothing whatever was paid for that simulated and fictitious sale, Rec. pp. 130; 250,) would be obvious to any intelligent, however unprofessional observer, and is moreover proved by the authorities we adduce.

Hovenden on Fraud, p. 436: "If a testator give his executors an entire discretion whether to exercise, or omit exercising, an authority given to them by the will, should it appear that they act *mala fide*, a court of equity will interfere."

In the case of Monck *vs.* Newell, 5 John. Ch. 294, Chancellor Kent says:

"Lord Thurlow, in the case of Sadler *vs.* Hobbs, (2 Bro., 114,) took it to be a clear rule that where by any act or any agreement of the one party, money gets into the hands of his companion, whether a co-trustee or co-executor, they shall both be answerable. When one executor puts money into the hands of his companion, he shows that he had it in his power to secure it, and that his companion for some reason was permitted to obtain the possession of the money."

He referred, among other cases, to that of Gill *vs.* Attorney General, (Hardres, 314,) in which Hale, Ch. B., said that if by agreement between two executors, one is to receive and intermeddle with such part of the estate, and another with such part, each shall be answerable for the whole.

"The doctrine in that case perfectly applies to the disposition of the mortgage, and the defendant P. M., 'for some reason, not explained, by a formal act transfers his interest in and control over the mortgage debt to his companion, to be by him appropriated, dissipated, and lost.''

In the case of Spencer *vs.* Spencer & Coming, 11 Paige, 299, Chancellor Walworth held, according to the syllabus, that "where stock belonging to a trust fund is transferred under a joint power of attorney given by two trustees of the fund, they are both liable for the whole proceeds of the stock, although such proceeds pass wholly into the hands of one of the trustees. The joining in the sale of stock by a trustee, and his suffering the money received for the stock to go into the hands of his co-trustee, renders him liable to the trust fund for such money in case of a misapplication thereof by the co-trustee.''

No. 11, 2d Lomax, 491:

"In equity, the doctrine has been stated to be clear that when, by any act or agreement of one party, money gets into the hands of his companion, whether as co-trustee or as co-executor, they shall both be answerable. When A, B, C, and D, took out administration, and appointed C to be the acting administrator, and directed the debtors to pay their debts to him, and C became insolvent, A, B, and D, were held responsible.''

No. 12, L. M. Lomax, 492, 493, (492 whole page:)

"By the established rules of equity, a trustee who stands by and sees a breach of trust committed by his co-trustee becomes responsible, (Ibid, 494, note 7; ibid 495,) if guilty of actual or tacit connivance in the breach of trust.'' (See also 5 John. Ch. 283; 4 Johns., 23.)

5. We come now to the only matter of defence which, at first sight, this case would seem to present, to wit: supposed acquiescence and lapse of time. Indeed, the fraud which despoiled the appellants, and before them their father, of the enjoyment of their rights, was the fictitious sale of the residuary estate of James R. Smith to Robert Dyson of December 26, 1829, nearly forty years before this suit was instituted. A claim for the first time submitted to a court of justice after so long a delay, always creates a suspicion of acquiescence or inexcusable laches, and this suspicion must be removed by evidence accounting for so long a delay.

The rights of their father, the remainder-man under the bill of James R. Smith, date back to the death of his mother, the fifth of September, 1847, twenty-two years before the institution of this suit.

Abbott, 13 N. Y. Dig., 2d Supp., 428, No. 3:

"As against an action of ejectment by the remainder-man, the statute of limitations does not begin to run in favor of a person in possession under the terminor till the determination of the precedent estate." (N. Y. Supe'r C't, 1862; Fogel *vs.* Pino, 10 Bosw., 100; S. C. Abb. Pr., 113.)

The answer of the defendants below sets up various statutes of limitations of the State of New York, among which they do not seem to have made a decided choice of any one as peculiarly applicable to this case. Nor will the writer of this brief undertake to make such a choice, for which he is so infinitely less prepared than his opponents; but it seems to him enough to know that the shortest of these periods of limitation, however inapplicable it may be to this case, is that established by Art. 91 of the Code of Procedure of the State of New York, which bars actions based upon fraud by a period of six years from the discovery of the fraud. In equity, no claim arising out of fraud is barred either by a statute of limitations or by the peculiar equity doctrine of staleness of demand, except from the discovery of fraud;

and we are fully prepared to meet the supposition most unfavorable to us, to wit: that Art. 91 of the New York Code of Procedure is applicable to this case.

We answered this plea of the statute of limitations by an amended bill, in which we alleged: "That whereas the defendants in their answer rely upon the statute of limitations and charge that George Augustus D. Clarke, the father of your orator and oratrix, was under no disability since the death of his mother, Jeanet Clarke, which occurred on the fifth of September, 1847; that, after the death of his said mother, he expressly ratified and approved all the acts and doings to his prejudice complained of in the original bill; had acquiesced in them and ratified them, and was fully cognizant of them, and that he had at all times the means of ascertaining the condition of the estate of his grandfather and prosecuting his rights in the same; and whereas the aforesaid allegations of the defendants are utterly untrue in every particular; and whereas the statute of limitations in a cause of fraud like the present one, only runs from the discovery of the fraud, your orator and oratrix aver that a knowledge of said frauds, sufficiently distinct to prosecute the rights they have inherited, never was possessed by their said father, and was only obtained long after his death and within a few, and much less than six, years, through the great exertions and pecuniary sacrifices of an able and partial friend."

This amended bill then goes on to explain how the suspicions of the father were first awakened that he had been deprived of some rights, of the nature and importance of which, however, he never obtained any knowledge in his lifetime. These suspicions were all that he could bequeath to his widow and children, and it was by the singular accident explained at the outset of this brief, that they ripened into that complete and accurate knowledge of the facts of this case, which the bill and the evidence filed in the case exhibit.

This amended bill states, and we prove by the deposition

of the late General Richard Delafield, which was taken in this case, that on April 12, 1853, he wrote a letter to Lieutenant Richard Smith, Assistant Teacher of Drawing at the West Point Military Academy, of which a press copy was then before the witness. The witness further says—we copy his words—that, in consequence of this letter, "Mr. Smith came to New York and had an interview with me. I gave him an abstract of title prepared for me by Mr. James S. Huggins to a lot I purchased in Eighteenth street, New York city, on which I was about to erect a building. And for the reason that I believed, from the perusal of the papers given to him, that he had an interest in part of said lot, through his wife, the daughter of Matthew St. Clair Clarke and his wife; and I informed him, before putting up an expensive building on the entire lot, I would like to put at rest and beyond all doubt any question as to the form of title through which it is derived, which I believed could be done by him (Smith) and his wife. In consideration of which I could put him in possession of old documents to show his interest in part of said lot and other property bequeathed under the will of James R. Smith to Mrs. St. Clair Clarke during her lifetime. After this, Smith and his wife, General Wm. B Franklin and his wife, John Clarke and Edward Clarke, children of Matthew St. Clair Clarke, all personally known to me, gave me a deed conveying all their right, title, and interest in and to the part of the lot in question."

The witness knew that Lieutenant Smith had no knowledge of his interest in this lot, from Smith's statement to him. The amended bill recites in substance what is stated in a more authoritative shape in General Delafield's deposition, and then proceeds to say, that one of the daughters of Matthew St. Clair Clarke wrote a letter to George A. D. Clarke, the father of the complainants, summarily stating that they learned that they had been defrauded of their rights under the will of their common grandfather, James R. Smith; that they intended to bring suit for their recovery,

and invited him to join them, as he had probably been defrauded in the same manner.

It is more than probable that this daughter of Matthew St. Clair Clarke did not then know that she had been defrauded of her inheritance by her own father and mother; but Geo. A. D. Clarke, who was a resident of Washington city and who, notwithstanding his confiding disposition and limited knowledge of the world, was a man of figures and accounts, might well have received this information as an explanation of the superb style in which Matthew St. Clair Clarke had long lived in Washington city, and which his salary as clerk of the House of Representatives did not warrant. He became greatly excited, went to consult the Fox sisters, (spiritualists or table-rappers in Washington city,) who told him that he would succeed, (see the depositions of Mrs. Quinn, Rec., p. 41,) and requested Shaffner, his most intimate friend, to employ a lawyer for him in New York, which Shaffner promised to do. The intimacy between G. A. D. Clarke and T. P. Shaffner commenced at Cumberland, Maryland, in 1840, the one being clerk in a bank, and the other a law student; it was brought about by their both being ardent Masons and Odd Fellows, and was continued up to the time of the death of George A. D. Clarke, so far as their different avocations permitted. Shaffner employed Robert D. Holmes, a most respectable New York lawyer and a great man among the ancient and respectable order of Masons, who informed Schaffner, on the latter's return from Russia in 1857, that he had corresponded with G. A. D. Clarke, but that Clarke having been unable to give him any definite information, or to pay for the necessary search, no progress had been made in the matter. (Rec., p. 71.)

The death of this Mr. Holmes occurred before we were aware of his connection with G. A. D. Clarke. Had he lived a little longer he probably could have given to the court the most authentic account of the nature and extent of G. A. D. Clarke's knowledge of his rights. At least his wife, now the

wife of Thomas Quinn, and the partner of his bosom, and, as her deposition shows, a very intelligent person, to whom he revealed all his thoughts, knowledge, and aspirations, never heard from him that he had the least knowledge of the nature of his rights. Neither she nor his most intimate friend, T. P. Shaffner, believes that he ever saw the will of James R. Smith, and certainly, if they are to be believed, he had no copy of it. A copy of it (and what copy?) may have been shown to him when he was a mere boy, but what impression could it have produced upon his mind, if he understood it, except that he was to expect nothing until his mother died? And he was all along, until Matthew St. Clair Clarke died in 1852, under the pupilage of that uncle, at once dreaded and revered, and the idea of opposing him was no doubt revolting to him. As far as the evidence goes, he certainly never received anything either from his mother or his grandfather's estate; for five years he lived upon his salary as teller of the Mineral Bank at Cumberland, at $1,000 a year, and received some assistance from the Freemasons or Odd Fellows' lodges to which he belonged, (T. P. Shaffner,) and when he lost that situation his wife and two children were supported by his wife's brother. Then he removed to Washington city, where he remained some time without employment, and at last he got a situation as clerk in the Interior Department. Before he got it, his wife and children were supported by the Rev. John R. Kehler, the wife's father; and after he got that situation, it was yet insufficient for the support of his wife and the three children he then had living, and he employed the hours, when his attendance was not required in the Government office, in writing for members of Congress. And of course such extra business and compensation lasted only during the sessions of Congress.

Numerous witnesses that were examined in this suit, the widow of G. A. D. Clarke, A. S. H. White, a clerk in the Interior Department, and companion of G. A. D. Clarke;

Syphax, the messenger of the office in which G. A. D. Clarke was employed, who, at office hours, occupied the same room, and was most intimate with him; Erwin, who married the sister of G. A. D. Clarke's wife, and his wife, who lived in the same house with G. A. D. Clarke's family up to the time of his death, concur in stating with considerable particularity that the letter mentioned in the amended bill was the first and the only intimation he ever had that he had been defrauded, perhaps of property of much value, to which he was entitled under his grandfather's will. Early in life he had been told that his mother was left an estate by her father. For some time Matthew St. Clair Clarke furnished her with money. But already, in 1840, according to the witness Shaffner, her means were very limited. The disastrous speculation with R. Dyson, explained in Jeanet's bill in chancery, had then no doubt swept away a considerable portion of the property standing in the name of Matthew's wife and of Jeanet. And when, after this, G. A. D. Clarke saw his mother living in poverty until the 5th of September, 1847, leaving apparently no estate, and that Matthew St. Clair Clarke himself, whose wife had the same interest in the estate of James R. Smith as his own mother, also died in May, 1852, utterly destitute and insolvent, G. A. D. Clarke may well have concluded that the rumors he had heard in his childhood of a great inheritance were like those concerning English estates expected by American heirs, of which every now and then we hear accounts in the newspapers, and which turn out to be myths. But when G. A. D. Clarke heard from his cousin that they had reliable information that she and probably other grandchildren of James R. Smith had been defrauded, the half-forgotten dreams of his youth were probably revived. Several of the witnesses examined in this case have seen that letter, which, however, can no longer be found. They all agree that it contained only a general statement of the discovery of a fraud committed to their prejudice, but gave no other details. This

intimation was received by G. A. D. Clarke, and was exclusively all the information he had concerning the frauds that had deprived him of his inheritance. From that time to the time of his death, on October 14, 1855, he fretted, strove to obtain more information, corresponded with Robert D. Holmes, and perhaps others, solicited the assistance of his friend Shaffner, but could not then leave Washington, where the daily support of his family required his presence, nor spare any money from his scanty salary to pay for professional services in New York.

This, assuredly, is not such a discovery of the fraud as can put the statute of limitations in operation, nor was it such a description and amount of information as could be considered as sufficient notice. If our opponents maintain the contrary, they will discover the impossibility of finding a single reported case countenancing such views.

6. In their answer, the executors say, that the only thing James Boorman ever did after 1830, in relation to the estate of James R. Smith, was, that "in the year 1861, the said James Boorman, as sole surviving executor of the said Jas. R. Smith, fairly sold for the sum of $52 and 57 cents certain stock of the Elmira and Southport Bridge Company, which had stood in the name of Jas. R. Smith, and being part of his personal estate, and did at the same time and in the same last mentioned year receive the further sum of sixty dollars and twenty cents, for dividends due thereon."

And further on the answer says, that "if any cause of action by reason of such sale, receipt, or last mentioned will of said James Boorman, subsequently to the death of said Jeanet Clarke or George Augustus D. Clarke, ever existed, such causes of action or suit did not nor did any of them or any part thereof arise or accrue within seven years and four months before the filing of this suit; and the defendants pray the benefit of this objection and of the statutes for the limitation of suits and actions in this behalf, and the rules of equity in respect to acquiescence and non-claim, as if the defendants

had stated or set up the same in a more precise or formal manner by plea, demurrer, or otherwise."

There is a palpable *lapsus pennæ* in this part and in another part of the answer in regard to this small amount of stock. This other part of the answer is where it is said that may be G. A. D. Clarke did not acquiesce in that sale. The sale was made after his death and during the minority of his heirs, and is, therefore, not affected by the statute of limitations.

But this sale of 1861, which Boorman avowedly made as executor of James R. Smith, shows that he then still acted as executor, and had not disavowed the trust. Indeed, when did he ever disavow the trust, to the knowledge of the remainder man, G. A. D. Clarke, the real *cestui que trust?* At no time during the life of G. A. D. Clarke, so far as we are aware, nor did his representatives do so, except by their answer in this suit. Consequently time did not run against the complainants.

"Time only begins to run against an express trust from the period when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust.*" Boone *vs.* Chiles, 10 Pet., 177; (3 Abb., 221.) In 10 Pet., 223, Baldwin J. says: "Though time does not bar a direct trust as between trustee and *cestui que trust* till it is disavowed," &c.

Carroll *vs.* Carroll, 11 Barb., 296. "Every new act of his (the executor's) in raising money as executor, out of the estate, to pay the debts of the testator, was as effective an acknowledgment of his continuous acting as executor, and his continuous and unbroken liability as executor, as if in each case he had promised each devisee or legatee that he would account as executor."

7. The only thing remaining to be considered in this case is the effect of acquiescence and lapse of time set up in the

answer. This is the real and only defence in the case, and being at first sight very serious it requires to be elucidated by a careful examination of the evidence and of the law. We conceive that upon this matter depends the whole case, and that there is nothing else in the defence. When we consider that we have in hand the establishment of the rights of minor children, who were ruthlessly defrauded of the fortune their great-grandfather left to their father, we who know how much these minors have suffered by the most unqualifiable doings of the persons to whom their protection had been entrusted, feel a degree of responsibility which induces us to crave the indulgence of the Court if we enter into the examination of this subject at greater length than is usual in ordinary suits. Actuated by such feelings, we have already extended this brief to a considerable length, but if there yet remain many pages to be read, the Court will hear with satisfaction that very little of that remainder is the production of our own feeble powers, but is composed of the decisions of the master-minds of the judiciary of the United States and of Great Britain upon the questions presented in this case. Our courts of justice follow the precedents established by competent authority, but even such men as Kent and Story, the luminaries of the American judiciary, and probably the most industrious and enthusiastic votaries of what we may be permitted to call "the science of justice," could not have commanded in any particular case submitted to them, within the space of time allowed to them by the pressure of suitors, a complete review of the labors of their esteemed predecessors, and would not have disdained and repelled the assistance of counsel who, not pressed by public business, can collect such precedents for their examination. Being persuaded that the fate of our clients depends upon a correct decision upon this point of acquiescence and lapse of time, we have collected and submit a number of precedents, from which we make copious extracts, thus saving the Court the search for books not always at hand, while at the same

time enabling it to verify every extract or quotation. Thus the Court may expect to find in the remainder of this brief much interesting reading, only here and there interspersed with introductory remarks of our own, calling the attention of the Court to the applicability of the authorities to our own case.

In the course of this examination we expect to establish—

1st. That in the case of the fraudulent violation of a direct trust, the statute of limitations will not apply in equity, nor any lapse of time short of what the equity court may, in each particular case, consider staleness of demand or laches.

2d. That the acquiescence or ratification by the father of the complainants, though set forth in the answer, is utterly unsupported, or rather disproved, by the evidence in the record. And in that connection we shall review that part of the evidence not heretofore noticed in this brief.

3d. That the limitation of six years from the discovery of the fraud, established by Art. 91 of the New York Code of Procedure, if at all applicable to this case, and if it was formally pleaded to the principal, nay, only demand in the bill, cannot take effect, because the fraud never was discovered in the lifetime of G. A. D. Clarke, and only during the minority of the complainants, in the manner hereinbefore described.

8. This is a case of a fraudulent violation of a direct trust, and the limitation relied on, therefore, does not apply.

In White & Tudor's Leading cases in Equity, vol. 1, p. 218, it is said: "Independently of circumstances, equity usually adopts as a bar to the assertion of such a trust the period which bars a title at law; but circumstances may always be considered either to shorten or lengthen the time. In the late case of Michoud *et al. vs.* Girod *et al.*, (4

Howard, 504, 661,) it was said that where there is actual fraud, no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

In the late case of Bowen *vs.* Evans, (the House-of-Lords Cases, vol. 11, p. 281 of the new, and 203 of the old edition,) it was said by Lord Cottenham, in 1848, September 21: "It is true that if a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of a court of equity, and a purchase under it, or of a judgment at law or other transaction between the actors in the fraud. But in proportion as this jurisdiction is powerful and operative, so ought the care and caution of the court to be anxiously exercised as to the grounds upon which it proceeds, lest, in the zeal to do equity, the reverse be effected. So, when much time has elapsed since the transactions complained of, there having been parties who were competent to have complained, the court will not, upon doubtful or ambiguous evidence, assume a case of fraud; although, upon fraud clearly established, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of equity depriving them of the effects of their plunder."

3 Abb. Nat. Dig., 221, No. 96: "In general, length of time is no bar to a trust clearly established to have once existed, and where fraud is imputed and proved, the length of time during which that fraud has been concealed and practised, is rather an aggravation of the offence than a circumstance to exclude relief." (Prevost *vs.* Gratz, 6 Wheat., 481; Bank of United States *vs.* Beverly, 1 How., 134; Mi-

choud *v.* Girod, 4 How., 503. To the same effect is Pratt *vs.* Oliver, 2 McLean, 267.)

Abbott Nat. Dig., vol. 3, p. 221, No. 100: "The rule in equity as to the statute of limitations in cases of trust is, that those trusts which are mere creatures of a court of equity and not within the cognizance of a court of law, are not within the operation of the statute. So long as there is a subsisting and continuing trust acknowledged or acted upon by the parties, the statute does not apply." (4 Wash., C. C., 631.)

Abb. N. Y. Dig., 721: "No lapse of time bars a direct and express trust, as between the *cestui que trust* and the trustee. Thus an executor or administrator who comes into possession as an express trustee, cannot, as against legatees and distributees, avail himself of the lapse of time during which he held such possession." (Chancery, 1817, Decouche *vs.* Savatier; 3 Johns. Ch., 190. To similar effect, 1818 Evadrich *vs.* Pendleton, id. 384.)

3 Abbott Nat. Dig. p. 221, No. 102: "The principle that the statute of limitation will not protect trustees, applies only to express, not constructive trust." Boone *vs.* Chiles, 10 Pet., 177; Michoud *vs.* Girod, 7 How. 503; Hayman *vs.* Kelly, 3 Crain, C. Ct., 325.

9. Acquiescence, confirmation, ratification and the supposed acquiescence resulting from inaction during a certain lapse of time after the discovery of the fraud.

Among the numerous works we have consulted on this important subject, the one which appears to us to expound most clearly, tersely, and completely the rules of equity in this class of inquiries is "A Treatise on the Law of Fraud and Mistake as Administered in Courts of Equity," by W. W. Kerr, published in London in 1868. We therefore copy from the text of this work very copiously, omitting, however, the numerous references to adjudicated cases, which the court, at its convenience, may consult by reference to the work itself. Our extracts from Mr. Kerr's work will, how-

ever, be followed by references to actual decisions which appear to us most applicable to the case before the court:

"SECTION VI.—*How the right to impeach a transaction on the ground of fraud may be lost.*

"Transactions, although impeachable in equity at the time of inception, and for some time afterwards, on the ground of fraud, may become unimpeachable by a subsequent confirmation, by acquiescence, or by mere lapse of time.

"*Confirmation.*

"In order that an act may have any effect or validity as a confirmation, it must clearly appear that the party confirming was fully apprised of his right to impeach the transaction, and acted freely, deliberately, and advisedly, with the intention of confirming a transaction which he knew, or might, or ought with reasonable and proper diligence to have known to be impeachable. If his right to impeach the transaction be concealed from him, or a free disclosure be not made to him of every circumstance which it is material for him to know, or if the act takes place under pressure or constraint, or by the exercise of undue influence, or under the delusive opinion that the original transaction is binding on him, or if it be merely a continuation of the original transaction, the confirmation acts as nothing. Confirmation may be by will as well as by deed. If an independent legal advisor be employed, it will be assumed that he had satisfied himself before approving of the transaction, that it was for the benefit of his client to confirm it.

"*Release.*

"The same requisites which are necessary to render a confirmation valid, are necessary to render a release valid.

"*Acquiescence.*

"It is not necessary, in order to render a transaction unimpeachable, that any positive act of confirmation or release should take place. It is enough if proof can be given of a fixed and unbiased determination not to impeach the transaction. This may be proved, either by acts evidencing acqui-

escence, or by the mere lapse of time during which the transaction has been allowed to stand.

"Acquiescence or delay for a length of time after a man is in a situation to enforce a right, and with a full knowledge of facts, is, in equity, cogent evidence of a waiver and abandonment of the right. If a voidable contract, or other transaction, is voluntarily acted on, with a knowledge of all the facts, in the hope that it may turn out to the advantage of a party who might have avoided it, he may not avoid it when, after abiding that event, it has turned out to his disadvantage.

"To fix acquiescence upon a party it must unequivocally appear that he knew or had notice of the fact upon which the alleged acquiescence is founded, and to which it refers. Acquiescence imports and is founded on knowledge. A recognition resulting from ignorance of a material fact goes for nothing. The question as to acquiescence cannot arise unless the party against whom it is set up was aware of his rights. A man cannot be said to acquiesce in what he does not know, nor can he be bound by acquiescence unless he is fully apprised as to his rights and all the material facts and circumstances of the case.

Nor, indeed, is a recognition of avail which assumes the validity of a transaction, if the question as to its validity does not appear to have come before the parties. The mere fact that a man may have heard unfavorable rumors, and conceived suspicions, is not enough to fix him with acquiescence. The proof of knowledge lies on the party who alleges acquiescence, and sets it up as a defence. If the transaction has taken place under pressure, or the exercise of undue influence, it must clearly and unequivocally appear that the party against whom acquiescence is alleged was *sui juris*, and was released from the influence or the pressure under which he stood at the time of the transaction, and acted freely and advisedly in abstaining from impeaching it. Acquiescence goes for nothing so long as a man continues in the same situation in which he was at the date of the transaction. But as soon as a man with full knowledge, or at least with sufficient notice or means of knowledge, of his rights and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly and deliberately

permits another to deal with the property, or incur expense, under the belief that the transaction has been recognized, or freely and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity."

"*Delay and Lapse of Time.*

"The mere lapse of time during which a transaction has been allowed to stand, may render it unimpeachable in equity. A man who seeks the aid of a court of equity must assert his claim with reasonable diligence. It is a rule of equity not to encourage stale demands, or give relief to parties who sleep on their rights. The rule is founded on the difficulty of procuring full evidence of the character and particulars of remote transactions, and is independent of the statute of limitations. In the case of legal titles and legal demands, courts of equity act in obedience to the statutes of limitations; but if the demand is not of a legal nature, or is strictly equitable, the statutes of limitations are not a bar in equity. Courts of equity, however, look to them as guides, and assimilate their rules as far as they can, and as far as the transactions will admit, to the law. Where a bar exists by statute, equity will, in analogous cases, consider the equitable rights as bound by the same limitations; but in cases where the analogies of law do not apply, a court of equity is governed by its own inherent doctrine not to encourage stale demands. Parties who would have had the clearest title to relief had they come in reasonable time, may deprive themselves of their equity by a delay which falls short of the period fixed by the statutes. Lapse of time, when it does not operate as a positive or statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver. The two propositions of bar by length of time, and bar by acquiescence, are not distinct propositions. They constitute but one proposition. Acquiescence, however, as distinguished from delay, imports conduct.

"No precise or defined limit of time can be stated within which the interposition of the court must be sought. What is a reasonable time cannot well be defined so as to establish any general rule, and must in a great measure depend upon the exercise of the sound discretion of the court under all

the circumstances of each particular case. In Gregory *vs.* Gregory, Sir W. Grant, M. R., refused to set aside a purchase by a trustee after a lapse of eighteen years. So in Selsey *vs.* Rhodes, where a lease was granted to a steward, and eleven years had elapsed, the court refused to set the lease aside, though there were special circumstances in the case. So in Baker *vs.* Read, a bill filed after the lapse of seventeen years to set aside a purchase of a testator's estate by his executor, at an undervalue, was dismissed on the ground of delay. The question as to delay may be much affected by reference to the nature of the property, or to the change of circumstances as to the character or value of the property in the intermediate period. A delay which might have been of no consequence in an ordinary case may be amply sufficient to bar the title of relief when the property is of a speculative character, or is subject to contingencies, or where the rights and liabilities of others have been in the meantime varied.

"The question as to delay may be also materially affected by reference to the relation which subsists between the parties. If, for instance, the transaction be between solicitor and client, a delay which would be fatal in other cases may be permitted, for the solicitor must know that the onus of supporting the transaction will rest on him, and that, if he desire it to be upheld, he must preserve the evidence which will be required to uphold it.

"The rules of the court as to lapse of time being a bar in equity apply to cases of constructive trusts, and even to transactions between trustee and *cestui que trust* in respect to the trust estate, as well as to ordinary transactions. Length of time can, however, have no effect between trustee and *cestui que trust*, except the trusts are properly executed. There is a wide distinction between trusts which are actual and express and constructive trusts. A trust by which a man undertakes to hold and apply property for the benefit of another is widely different from the case of ownership, subject to the claims of another, if he thinks proper to enforce it. In the case of continuing express trusts, created by act of parties, no time is a bar, for from the privity existing between the parties, the possession of the one is the possession of the other, and there is no adverse title. Nor is length of time a bar where a debt has accrued in consequence of a violation of confidence bestowed in a fiduciary

character. But if the trust, though express, be not continuous, and the case be one of gross laches, the general rule of equity, that encouragement is not to be given to stale demands, is equally applicable.

"If there be laches on both sides, the ordinary rules as to delay and acquiescence may not apply.

"Time, however, does not begin to run against a man in cases of fraud, until he has knowledge of the fraud. Time begins to run only from the discovery. The statute of limitations is no bar in equity in cases of fraud. The right of the party defrauded is not affected by lapse of time, or generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed. Lapse of time imputed as laches may be excused by the obscurity of the transaction, whereby a man is disabled from obtaining full information of his rights. Time does not begin to run against a man, so as to bar the remedy, until he has full information of his rights and injuries, or has in his possession the means of knowledge; or, at least, has sufficient notice to put him on inquiry, and, in cases where the transaction has taken place under pressure or the exercise of undue influence, is emancipated from the dominion under which he stood at the date of the transaction. The objection of time is removed so long as a man remains, without any fault of his own, in ignorance of his rights and injuries, or is under a legal disability, or so long as the dominion or undue influence which vitiated the transaction is in full force."

10. Acquiescence, the statutes of limitation, and lapse of time.

This, as we said before, was the principal—nay, the only reliance of the defendants.

But, as such pleas are much affected by the relations of the parties to a suit, we shall first review another part of the case, which, as yet, we have not brought to the notice of the court.

If Boorman was, indeed, the high-toned, conscientious man, as most respectable testimony showed him to be, and had been alive when this suit was instituted, he would have

revolted at the idea that he could find no protection from the claim of the plaintiffs, except in such a plea. We are persuaded that, if this suit had been instituted in Boorman's lifetime, he would have promptly settled with these unfortunate minors, though he might well have resisted similar claims on the part of the children of Matthew St. Clair Clarke, the author of all the mischief, and which we think he would have defeated. But what did Boorman really do, and what were his probable intentions? Certainly not to appropriate to his own use any portion of the estate, but to get rid of the business. He had left the management of this complicated estate, composed of a good many hundreds of pieces of property, exclusively to Matthew St. Clair Clarke, to such an extent that we recollect from the answer filed in this case, that neither he nor Radcliff ever had a list of the property of the estate; he was no doubt constantly interrupted and called upon for his signature to documents relating to property of which he personally knew nothing; and it seems probable that he had begun to distrust the restless, crafty, plausible, and insinuating co-executor, with whom the will had associated him, and whose turn of mind, as we know from their history, was entirely opposed to his own. Boorman was perfectly aware that the codicil left the residuary estate to the grandchildren of the testator, to come into their possession only after the death of their parents and on their attaining the age of twenty-one years, but he was probably unwilling to be burdened with such a distant trust, and being no doubt constantly annoyed by the plausible and continuous importunities of Matthew St. Clair Clarke, he yielded to his entreaties, joined in the last sale to Robert Dyson, defeating the will, and chose to rely upon the indemnity bond which the children of James R. Smith executed in his favor, and which was executed on the 10th of July, 1820, and is in evidence, having been called for by the bill, and admitted by the answer, and, by the stipulation of parties, as No. 24 of the evidence. (Rec., p. 235.)

This long document recites the will, and particularly the 12th article of the codicil, at length, mentioning the provision of the will, that each executor shall only be responsible for his personal receipt, acts, and willful defaults, the settlements for the debt due by the estate of James R. Smith to the estate of Hannah Rodgers, the conveyance in fee to the three daughters for the one-third of each of their shares, and further says that the two surviving executors "*under and by virtue of the power for that purpose contained in the said last will and testament, and by and with the advice and approbation, and at the request of all the parties interested and concerned therein, did afterwards*" by a deed of December 26, 1829, for the sum of $64,710.59, to said Matthew St. Clair Clarke in hand paid, sell to Robert Dyson, "*all and singular, two-third parts of the portions and shares of the daughters of said testator.*" And this instrument further says that, whereas Boorman had fully accounted for any money of the estate that had ever come into his hands, they (the four children and heirs of James R. Smith) had released, exonerated and discharged him from all responsibility arising out of his executorship, and *warrant and agree to save him harmless and indemnify him from all losses, damages, suits, claims and demands, for, by reason, or on account of his having made, executed, joined in the making or execution of the several deeds previously mentioned.*

This instrument completes the history of the fraudulent manœuver by which the complainants were sacrificed, and Boorman, with his eyes open, accepted it in lieu of a settlement of his trust in court. The instrument boldly alleges untruths contradicted by itself. It says that the sale of the two-thirds to Dyson was made under the authority given by the will, whereas the testator directed this portion of the estate to be "reserved," and not sold. It says the sale was made at the request of all the parties interested; whereas, in the same instrument, the provisions in favor of the grandchildren—that is, the real owners of the fee of these two-

thirds —is copied. And how were they represented? The sale to Dyson is stated to have been made for cash, which was untrue. The real object was as fully known to Boorman as it now is to the court, to wit: to give to the mother the apparent fee of the property, which had previously been divided by agreement of October 21st, 1829. All allusion to a division was also suppressed, and this agreement of division was also never put on record, in order to deceive contemplated purchasers of this property. Boorman joined the mother and Matthew St. Clair in these measures, intended to obscure the transactions, and holding out deceptive appearances, by not recording this indemnity bond. (This is admitted by the answer.) Had Boorman sought his discharge from a court of justice, as it was his duty to do for the protection of the objects of his trust, (the grandchildren,) the court would never have given the fee to the mother, nor permitted the sale of the two-thirds, but would have taken care of the interest of the minors, as was done by the Master of the Rolls in the case of Orrok *vs.* Binney, Jacob, 523; thus mentioned in § 1,501 of Williams on Executors:

"In a case where it appeared, on a bill by an executor to recover a fund belonging to the testator, that the testator's debts were paid, and that the fund was bequeathed to infants, the court refused to have it transferred to the executor, but secured it in court for the benefit of the infants." (Orrok *vs.* Binney, Jacob, 523.)

This indemnity bond is document No. 24 of the evidence of the complainants; it is accompanied by numerous letters, the genuineness of which is undoubted. We need not mince the matter. Mr. Boorman was badly advised by Radcliff, who, notwithstanding his learning, was not proof against the seduction of that plausible Washington courtier, Matthew St. Clair Clarke, of whom no doubt he had too good an opinion. Radcliff was perhaps furthermore deceived by the ostentatious proposition of the daughters to mortgage to one another the divided third, to which they had received

titles, in order to secure a compliance with the devises of the will. These mortgages were indeed executed on the 30th of June and 10th of July, 1830 (the latter is also the date of the indemnity bond.) They literally recited the provisions of the 1st article of the codicil. These are documents B, C, L, of the evidence of the defendants. But in 1834 these mortgages were raised, (documents E, F, G,) and then the title derived from Dyson enabled the daughters of Smith to sell the "reserved estate." Thus good-natured lawyers, who have faith in human nature, are sometimes deceived by people who have much less intelligence than themselves, but do not believe in the binding effect of promises.

Plainly, the complainants were sacrificed, because Boorman would not resort to a court of law, but was satisfied with this indemnity bond. He probably thought that there would not be any difficulty between the children and their mothers, and did not anticipate such a calamitous termination of Jeanet's interest as this record discloses.

We are confident that Boorman, who was evidently a man of a high degree of intelligence, though fond to a degree of weakness of his friends, *never* believed that the children of the daughters of James R. Smith could take nothing under the will, and never wrote a line expressing such an opinion. He had too much self-respect for that, and a pamphlet printed by him over his name, which we authorized the defendants below to file in the case, gave his own view of the matter. Boorman never would stultify himself.

But this case is so bare of defence that the ablest counsel undertaking to vindicate Boorman's course are forced into ingenious, painstaking technicalities. Thus we heard at the oral trial that the provisions as regards the two-thirds were invalid, that the daughters took the fee of the two-thirds, and much more of this sort; but the writer of this brief, while attentively listening to elegant sentences, was perfectly undismayed and convinced that they could not harm his case. Objections of this class may come with perfect pro-

priety from a defendant in an action of ejectment, or from a lawyer examining the title to property derived from a will, but they were absolutely inadmissible when coming from a co-executor answering a legatee's claim under the will to which both owe their relative position. The executor has no higher law for his administration of the estate than the will, as long as that is not *contra bonos mores*. He cannot correct the will, if in his opinion it is unjust towards some members of the testator's family. He cannot, for instance, give to the children the bequest which had been devised to the grandchildren. If by a provision of the will a question arises whether a devise shall go to the daughter of the testator or to that daughter's child, he cannot *proprio motu* decide between the mother and her child, and least of all when the child is a minor. It is not *his* business to ascertain what construction a rule of law may put upon a devise—that must be reserved for the parties themselves, when they choose to go to law. The executor's sole business is to ascertain and follow what the testator intended.

Williams on Executors, p. 180: "The will must be most favorably and benignly expounded, to preserve, if possible, the intention of the testator." Touchst., 434. 2 Black. Com., 381.

"If he imprudently oversteps his authority as an agent, if, for instance, he pays to the father a legacy left to an infant, or even to the father of an adult child, without the latter's express consent, the payment is not good." 314 Toller's Executors; 4 Bac. Abr., 419; 1 Chan. Ca., 215; 1 Johns. Cha. Rep., iii, 153; Cooper *v.* Thornton, 3 Bro. Ch. Rep., 97.

Thus in the case of a will devising an expectant estate which possibly could be set aside on the ground of remoteness, the executor has no right to decide that it shall or shall not be set aside and disregarded. This must be left to the parties in interest, who, perhaps not in a few cases, in consequence of family relations, or of respect for the memory

of a common benefactor, might never controvert the devise. Thus in our case not even our adversaries could say that anything had appeared, showing that Jeanet Clarke, if in her right mind, and freed from her vassalage to Matthew St. Clair Clarke, who kept her in constant fear of expulsion and starvation, and deprived her of her autonomy, would not have obeyed the usual dictates of maternal affection, and have fled with her son and the property in which they were both interested, from that tyrannical ruler of their destinies, Matthew St. Clair Clarke, and under the direction of a disinterested and more honest adviser, enjoyed in peace the use of the property in which she had a life estate and her son the fee. Situated as she was, she signed the papers robbing her son of his inheritance and prospects, without knowing what she signed, and not for her benefit, but for the benefit of Matthew St. Clair Clarke, who well knew that what was reputed as her property he could use as his known.

We beg leave to adduce here an illustration from another system of jurisprudence, easily understood without reference to books. By the civil law of Europe a father cannot entirely disinherit any of his children, except in a few extreme cases carefully designated by law. Hence, they are called forced heirs. If a father, in those not uncivilized countries, had four children, and he left a will devising all his property to three of them, entirely pretermitting the fourth, (perhaps because she was a Jewess and married a Christian,) and without assigning any of the exceptional grounds of exclusion established by law, could the executor, thinking (and perhaps justly and honestly) that this exclusion was unjust, distribute the entire estate in equal shares among the four children? Would his accounts be admitted upon showing such a division of the estate, if the three other children entertained the same detestable and absurd prejudices, (in the assumed case of the marriage of a Jewess with a Christian,) as their father? Certainly not; as every civilian would say. And still, if the discarded daughter and her hus-

band chose to resort to law, they would unquestionably recover a part of the father's estate.

This imaginary case is perfectly analogous to the one arising under the common law we have stated.

These duties of an executor, which we have attempted to define, are the deduction of what is called "equity." We think a better name for them would be "honesty and confidence." If these views of the duties of an executor, not responsible to the rest of the world, but only to his departed friend the testator, and the objects of the latter's affection are discountenanced, we should grieve to think that the doctrines of equity, though still alive in Europe, have departed from this land.

In order to present our argument in the fairest manner possible, and to show most distinctly what allegations we are there to meet on the subject of acquiescence, confirmation, limitation, and lapse of time, we here transcribe at length what the answer contains on this subject. The answer of the defendants says:

"That all the lands, tenements, hereditaments, and real estate of James R. Smith, left by him at the time of his death, were, with the knowledge of said Augustus D. Clarke, at and immediately after the death of Jeanet Clarke, in the quiet and peaceable possession of other persons strangers to said Boorman, under fee simple deeds. The defendants further say, that they do not know and therefore deny that either the said Boorman, or any other person mentioned in this connection in the bill of the complainants, ever concealed or intended to conceal anything concerning the disposal or disposition of the estate of said James R. Smith.

"The defendants further deny, that G. A. D. Clarke was at any time during his life without the means of investigating the settlement of the estate of his grandfather, the said James R. Smith, and any deed, conveyance, disposition and settlement of the same, save and except only, it may be, the mere acts of selling such stock and receiving such dividends."

The answer further says: "that Jeanet Clarke and G. A. D. Clarke, with such means of knowledge and such knowl-

edge as aforesaid, at all times during their lives, from the 28th of December, 1830, and their respective heirs and representatives, until the filing of this bill '*always acquiesced in every such conveyance, disposition and settlement*, save and except only it may be, such mere acts of selling said stock and receiving such dividends. And on information and belief, the defendants further answering say, that the said *G. A. D. Clarke, in his lifetime, and after the death of his said mother, fully and expressly approved, ratified and confirmed every such deed, conveyance, disposition and settlement, except it may be the mere acts of selling said stocks, and receiving such dividends.*"

The answer further says, "that at the time of the death of his mother, G. A. D. Clarke was and had been for years, to wit: since or about the 1st of October, 1836, of full age; that he survived her eight years, laboring under no disabilities."

The answer further says, "nor were the facts or any facts constituting or forming or contributing to any alleged frauds committed or intended by the said Boorman, as alleged, pretended or complained of in said complaint, discovered by any aggrieved party or parties or their representatives, within six years, or within seven years, or within ten years, or within twenty years, or twenty-one years and seven months before the filing of this suit." We may remark here that the State laws furnish the rule of decision in the courts of the United States in cases at common law, but the equity jurisdiction is the same in every State, and is in no respect dependent upon local law, (3 Wheat., 221; 4 Wheat., 108; 6 Pet., 258; 7 Pet., 274.)

"And," says the answer, "the defendants rely upon the statutes for the limitation of action and suits and the rules and principles of equity against entertaining suits or granting discovery or relief after such long *acquiescence and nonclaim*, as aforesaid." And in conclusion they say, that they "insist that such alleged causes of action, if any such there

were, wholly ceased, terminated and became irremediable by and at the death of said James Boorman, and incapable of being enforced against the defendants as executors."

These charges in the answer are unfounded. It will not be pretended that the evidence of the complainants contains the least scintilla of proof that G. A. D. Clarke ever approved any of the transactions mentioned in the bill, or even ever knew anything of them beyond the mere rumor that his mother had inherited property from her father, and that other rumor derived from a letter of his cousin, the wife of Lieutenant R. S. Smith, who himself never had heard anything until he received a letter from Major Delafield in 1853. When Mr. Joseph B. Stewart investigated the Smith estate, (Rec., p. 47,) he applied to the heirs of Matthew St. Clair Clarke for information, and found that they knew nothing at all about it. And how should G. A. D. Clarke have known anything about it, he who resided in Washington and divided all his time between his office and his family? Nor does the evidence adduced by the defendants below throw more light upon the subject of confirmation or ratification. The defendants produced witnesses who proved the honorable character and high standing of both Boorman and Radcliff, which we certainly do not presume to assail in general. But we impeach certain definite transactions; we prove them, and show that they were contrary to law, equity, and the rights of the complainants. The testimony of those honorable witnesses shows that Boorman could not and should not have done the matters of which we complain—but the sad truth is that he did them.

In the next place, the defendants produce two other most respectable witnesses, one of them the presiding judge of the circuit court. But their testimony proves nothing in support of the defence, and strangely enough proves an important incident in support of the complainants. These witnesses say that in 1843 Matthew St. Clair Clarke sent G. A. D. Clarke to Judge Woodruff to obtain the latter's legal ser-

vices (he being then a practising lawyer in New York) in completing the bills of sale and bonds and mortgages of certain lots which he (Matthew) jointly with Jeanet Clarke had procured to be sold through an auctioneer. These lots were embraced in the sale from Dyson to Jeanet Clarke of December 26, 1829. They were part of the property in which Jeanet had a life estate, and G. A. D. Clarke the fee. *That* G. A. D. Clarke never knew, nor did Messrs. Woodruff or Thompson either. Matthew St. Clair Clarke of course knew it. But the Smith estate had been so muddled, and Matthew St. Clair Clarke felt so secure of G. A. D. Clarke's ignorance and unhesitating obedience that he sent him to New York to procure the completion of the deeds by which he was himself defrauded.

Judge Woodruff declares, (Rec., p. 93,) that G. A. D. Clarke called on him in the fall of 1843 for the above-mentioned purpose. From a memorandum book Judge Woodruff can state the transaction was completed on the 1st and 4th of December, 1843, on the latter of which days G. A. D. Clarke paid him for drawing five deeds and three *grants*. He finds the last mentioned three documents described in his memorandum as *grants*. The purchasers of two of the lots accepted them without remark, but the three others required and obtained grants. This is further explained by Judge Woodruff by saying that Mr. Andrew Thompson called at his office and stated that he had been employed by one of the purchasers to examine the title, and had doubts of its validity, on account of the will, as he recollects, of James R. Smith, and the subsequent divisions or partition of the estate. Mr. Thompson also stated to the judge at the same time that Stephen Cambreleng had been employed by a purchaser of one of these lots, and Peter D. DeWitt by another purchaser, and that each of them had advised their clients not to accept the title, Judge Woodruff having afterwards, in view of the will, endeavored to satisfy Mr. Thompson that his doubts had no foundation. The Judge then called upon

Mr. De Witt, and after further conversation it was proposed that Mr. Clarke should execute an instrument, by way of release, of any interest of his own, or confirmation of the sale, the form of which he does not remember, but which he presumed Mr. Clarke would give without any hesitation. "During my interview with Mr. De Witt, Mr. Thompson came into Mr. De Witt's office and took part in the conversation and discussion there, and, according to my recollection, concluded, as did Mr. De Witt, that upon the procurement of such a release or grant from Mr. Clarke, his client would complete his purchase. I am not enabled to recollect at present whether Mr. Clarke was present at any interview with Mr. Thompson, and I do not recollect who went with me to De Witt's office;" but Judge Woodruff recollects that he informed G. A. D. Clarke that objections were made, and that it was desired that he should execute the releases and grants which have been mentioned.

"By his direction I prepared these instruments for each parcel sold to the clients of the three professional gentlemen I have named. My recollection is that the objections of these professional gentlemen and the grounds thereof were explained to him, and that necessarily involved the will of his grandfather. If he was present, the parts of the will were examined and gone into with some particularity; if he was not present, I must have stated and explained to him that it was from something arising under the will that they wanted those papers called grants. My impression is that the question discussed between Messrs. Thompson, De Witt, and myself was, whether Jeanet took an estate in fee, or whether her death, without issue, would devolve the title upon her brother and sister, or their issue, and connected with that whether, on the birth of issue, which issue should attain twenty-one years, her estate became absolute, whether it was so before or not, and, hence, if she had issue living who was twenty-one years of age, *whether his conveyance would not remove all chance of doubt.*"

Judge Woodruff says: "I have no recollection that George A. D. Clarke made any objection or opposition to the execu-

tion of the three grants when it was proposed to him. I remember that he was much gratified by the closing of the transaction."

The other witness, Mr. Andrew Thompson, (Rec., p. 97,) who was employed, in 1843, by Mr. Pinckney to examine the title of the lot which Mr. Pinckney had bought at the auction sale heretofore spoken of, says that he told Judge Woodruff that he had advised his client not to accept the title unless it could be shown that Jeanet had a child who had arrived at the age of twenty-one; and then Judge Woodruff introduced G. A. D. Clarke to Mr. Thompson. Mr. Thompson afterwards went to Mr. De Witt's office, and, after a few moments, Judge Woodruff and George A. D. Clarke came to the same office. "Before they came in I stated to Mr. De Witt that there was a child of Jeanet Clarke, twenty-one years of age, in the city, and asked him whether a properly executed paper from him would not make the title good, either as the title vesting upon such an event happening, or being a conveyance of the property, had or should belong to the child, which was said to be an only child. Mr. De Witt gave it as his opinion that it would, but would like to think more of it." "It was then proposed that the young man should execute a grant or release, as the case may be, and Mr. De Witt and myself agreed that that would be satisfactory, and the young man agreed that he would execute it." "The whole matter of the objections was talked over in Mr. Clarke's presence by us. He was a participant in it; he did not say much, but looked a great deal; he was an intelligent and active participator in the conversation." "The will was not read, to my knowledge, at that conversation when Mr. Clarke was present; extracts may have been. I read the will before, and had examined titles under it. I do not recollect that Mr. Clarke expressed any idea that he had any title to that property. It was expressed that he might in a certain event be entitled to it, and the idea was that the property vested in Jeanet when a child

became of age, and we wanted proof that there was such a child."

Mr. Thompson further says that at the interviews between professional gentlemen no papers were produced but the extracts which the witness had procured from the records, extracts from the will, extracts from deeds, and he thinks a legal decision. At the close of his deposition Judge Woodruff says: "I desire further to add that I have been called to this examination without having seen the will of James R. Smith for a considerable time, and not at all with reference to those inquiries, and without being referred to any papers connected with the subject, except my own memorandum of the date."

It is not probable that Mr. Thompson's recollections were more distinct than those of Judge Woodruff.

These depositions state the recollections of the witnesess of conversations which took place nearly 27 years before, which were not of particular interest to them, and of which no note was kept beyond a date and a name. It will presently be be shown by high authority that, notwithstanding the great respectability of the witnesses, such testimony must be entirely disregarded. But if it were considered, it would be discovered to amount to nothing. If a number of eminent lawyers, two of whom (Crambreleng and De Witt, Rec. pp. 94, 97,) certainly thought the fee was in George, and therefore required his renunciation or grant, were perplexed by the terms of the will, how could a young country bank clerk understand it, upon something that may have been read to him by an abstract taken by Mr. Thompson, which he, Clarke, certainly never read and never took into his hands. What was the object which brought Clarke into contact with these distinguished gentlemen? Not to vindicate his rights under the will of his grandfather, or even to investigate them, but to do what he could to terminate the sales in which his mother was interested. The legal gentlemen consulted, certainly never said to one another or to G. A. D. Clarke, that any other person but he himself or his mother

had any right to the lots. Nothing could therefore be more obvious than that the difficulty could be instantly removed by his own ratification of the sales. That was no doubt proposed the very moment it was ascertained that Jeanet had a son over 21 years of age then in New York, where he had gone previously to close the sales. To arrive at that conclusion, required no long reflection and deliberation. So little did Judge Woodruff believe that by giving this ratification G. A. D. Clarke gave up any actual right of his own, that he, without consulting Clarke, unhesitatingly promised his (Clarke's) assent. And also did Clarke immediately agree to it when it was proposed to him. When so simple a remedy was at hand to remove all doubts and objections, it is not probable that they could have been discussed at any length, or could have attracted the attention of G. A. D. Clarke.

If Judge Woodruff had been *his* (G. A. D. Clarke's) lawyer and understood the will, as we say the testator meant it, he would have been under the necessity of telling him that he, George, had the fee of these lots, and his mother only a life estate, and that they had been fraudulently put in his mother's name for the purpose of robbing him (G. A. D. C.) of his inheritance. But Judge Woodruff was not his lawyer, knew nothing of the complicated frauds which now have come to light, and even if he had known them, would no doubt, never have volunteered to suggest to the son to enter into litigation with his mother and uncle, when he found them apparently so well agreed.

Judge Woodruff had been the lawyer of J. C. R. Smith, the son of James R. Smith. After the son had attained the age of 25 years, his share of the estate of his father was untrammeled by any conditions and restrictions when he received it on the 15th of November, 1829. The frauds which despoiled the complainants were of a subsequent date, and in these matters, as the lawyer of Jas. C. R. Smith, no doubt he never was consulted. And when called upon to carry out an ordinary sale of city lots, he certainly never entered into

the laborious examination which fell to the lot of Mr. James B. Stewart and enabled us to bring this suit. It is also remarkable that Messrs. Woodruff and Thompson, who never met G. A. D. Clarke but on that occasion, should have discovered him to be a very intelligent man, when his intimate friend Shaffner declared that in business matters he was as weak as his mother; when Thurston, the president of the bank, who had known him seven or eight years, says his mind was very irregular, weak, in fact; and Smith, his mother's physician, says that his mind was about of the same calibre as his mother's. On the legal nature of such evidence that eminent equity judge, Desaussure, expresses himself as follows, in Irby *vs.* McCree, 4 Dess., 431:

"We do not think that these declarations amounted to an admission by Mrs. Lide that she had no right to the legacy, or had renounced that right. The court would require the most explicit, clear, and unequivocal declarations of a legatee, most distinctly proved, before they would consent to strip the heirs of the legatee of the benefit of a legacy. But we do not think the declarations imputed to Mrs. M. Lide amounted to a clear, unequivocal denial, or renunciation of her right to the legacy. *The proof, too, of these declarations, is of the most dangerous kind to be relied on to shake legal rights. It is founded on the recollection of a witness at the end of nearly twenty years; and we well know that a slight variation in the expressions might materially vary the sense. No imputation is intended to be thrown on the veracity of the witness, but we think that the recollections of conversations, after such a lapse of time, and after the death of one of the parties, is too uncertain to be relied on implicitly to destroy the rights of legatees.*"

The copious extracts we have printed from Kerr on Frauds and the cases cited by him, and those which fill the remainder of this brief, show irrefutably how utterly inadequate anything proved by the witnesses of the defendants below is to operate as proof of acquiescence or confirmation. It should have been shown that G. A. D. Clarke was fully apprised of his right to impeach the transaction, and acted

freely, deliberately, and advisedly, with the intention of confirming a transaction which he knew, or might or ought with proper and reasonable diligence to have known, to be impeachable. If every material circumstance was not disclosed to him, if the baneful influence which Matthew St. Clair Clarke exercised over him was not shown to have ceased, if he labored under the delusive opinion that the original transaction was binding upon him, (G. A. D. C. knew nothing whatever of the original fraud,) the confirmation amounts to nothing.

Kerr, p. 243, says: "The two propositions of bar by length of time and by acquiescence are not distinct propositions." Indeed, the same reasoning applies to both of them, and the two questions are frequently treated indiscriminately in the same decision of a court of justice. The numerous reported cases which we are going to cite, and partly to transcribe, apply to both of these questions so frequently at the same time, that it would not be easy to class each of them distinctly under one or the other head. We shall, therefore, not attempt this classification, though the cases we first print apply more generally to confirmation and ratification, and the latter to acquiescence and lapse of time.

As the period of the discovery of the fraud is the main point in the case, we shall, before proceeding to those questions, examine the means of discovery possessed by the father of the complainants, G. A. D. Clarke.

If the *cestui que trust* has any rights whatever, he has the right of being informed of the object of the trust in his favor, and, particularly when he is a minor at the time when the trust is created, he should be notified of it by the trustee. The evidence in the record leaves no doubt that Matthew St. Clair Clarke studiously concealed all knowledge of the condition of the estate of James R. Smith from George A. D. Clarke, and, after his death, one of his daughters told Mrs. Quinn that she had destroyed most of the papers left by him relating to the estate of James R. Smith, thinking them

useless. (Rec., p. 42.) As for James Boorman, he probably never saw George A. D. Clarke; never communicated with him; and yet never, in his lifetime, informed him that he disavowed the trust or claimed to have discharged it. G. A. D. Clarke would not have been so totally ignorant of his rights if Boorman had procured an inventory of the estate to be made, as he bound himself by oath to do when the will of James R. Smith was probated. At the oral trial the writer of this paper was informed that, in a majority of cases, the administrators appointed by the surrogate's court in New York file no inventories. Perhaps in those cases there is nothing to administer or inventory, which may not appear improbable when it is considered that the city of New York is the highway of European emigrants to the rest of the United States, and the daily recipient of thousands from the rest of the Union. The present writer was also informed that real estate is not included in the inventories filed in the surrogate's office. He, however, apprehends that the law under which the will of James R. Smith was probated was different; and he infers this from what Kent says (vol 2, p. 414) of the duties of an administrator, (and those of an executor, of course, are the same in this respect.) His duties and powers under the common law of the land may be summarily comprehended in the following particulars:

"1. He is to make an inventory of the goods and chattels of the intestate, in the presence and with the assistance of appraisers, who, in New York, Massachusetts, and probably other States, are to be appointed by the probate court and sworn. * * * Two copies of this inventory are to be made and indented, and one copy is to be lodged with the surrogate, under the attestation of the administrator's oath, and the other is to be retained. This inventory is intended for the benefit of the creditors and next of kin, * * * and the administrator will be obliged to account for the property mentioned in it. * * * He is liable also to have the letters of administration revoked, (and it is the same with the letters testamentary of an executor,) if an inventory be not duly made and returned."

If such was not the law in 1817, when the will of James R. Smith was probated, why did the form of oath which Boorman subscribed, express the obligation of making and filing an inventory? If an inventory had been filed, or any notice of the existence of a residuary estate had been brought home to G. A. D. Clarke, his lawyer (Holmes) could have prosecuted the inquiry into his right, and would not have declined it. If it be pretended that many deeds and documents relating to the estate of James R. Smith were in the public records, and that this was notice to G. A. D. Clarke, our answer is that we now know, thanks to Mr. Joseph B. Stewart, that such documents are dispersed through several hundreds of the public records of conveyances of the State and city of New York, and that if G. A. D. Clarke is charged with laches, neglect, and the effect of time, for not having made the same exertions that Mr. Stewart did, the plain answer is that such a reproach would be a fiendish sneer, totally unworthy of being listened to in a court of equity. All this would have been avoided if the executors had not from the outset treated the son of Jeanet Clarke as a common enemy, to be repressed, ignored, and kept in ignorance, until lapse of time should extinguish his rights.

By the will of James R. Smith, his executors had the right to sell the property of the estate. By the codicil made four months later, he ratified and confirmed it, except so far as it might be revoked or altered by the codicil. Under the codicil, therefore, the executors had the right to sell property for the payment of debts and legacies, but this power was taken away as to what the testator in the 12th article of the codicil calls "my reserved estate." As to that, he made a different disposition. He made it inalienable during the lifetime of his daughters and their husbands, gave them a life estate in it, and left the fee to his grandchildren, and in their default to his other children and their issue.

James R. Smith had a mania for buying up detached pieces of real estate. He thus came to leave at the time of

his death a greater number of detached parcels of real estate in New York State, New Jersey, and New York city, than any other prosperous citizen of these flourishing States—not as great by any means in value as that left by many others, but greater in number, perhaps, and thus making up a very complicated estate.

Much of this property was necessarily sold by the executors to pay legacies and debts. The disposal of his estate was subjected to a most searching inquiry by Mr. Joseph B. Stewart, extended over a number of years, and attended, as his testimony shows, by an expense of between nine and ten thousand dollars. (Rec., p. 47.) As all information concerning the extent of the property or the existence and amount of debts was withheld by the executors, Mr. Joseph B. Stewart, who was fighting the battle of the Treasury of the United States, without knowing or intending that he was at the same time fighting our own battle, naturally commenced his search with the sales made by the executors, in the order of their date, as is partially shown in the pamphlet he published on the "Estate of James R. Smith," annexed to his deposition in this case. His object was to ascertain what was left to Elizabeth, the wife of Joseph B. Duncan, against whom the United States had a large claim, then in charge of Mr. Stewart, who expected to make the property available for the debt of the husband. The testator left to the children whatever was not absorbed by the payment of debts and legacies, and no clue was found in the very numerous deeds concerning how much of the estate had been left to the heirs, or the amount of the debt, until he found deeds in which it was asserted by the executors and the children of James R. Smith, that all the debts of the estate were paid, and that they had agreed upon a partition in kind, based upon the valuation of the remaining property, which was all in real estate, made by James Boorman, Thomas Suffern, and Robert Dyson, on October 21, 1829. This agreement no doubt, as many other agreements between the parties did

recited the provisions of the codicil of James R. Smith, and nobody would have bought the property from the daughters of James R. Smith, as it thereby plainly appeared that the testator had given by it to his daughters only a "reserved estate," to be enjoyed by them during their life, and afterwards to be left in fee to their children, if these daughters left children over 21 years of age. But in order to remove this difficulty and to enable the daughters of James R. Smith, one of whom was the wife of Matthew St. Clair Clarke, and another Jeanet Clarke, his slavish dependant and victim, to enjoy this property in their lifetime, while the fee belonged to their own children, this agreement for a partition in kind of October 21, 1829, was never put on record, and another plan was devised to wind up the estate, and to relieve Boorman from any further connection with it, of which he was probably heartily tired. A sale of all this remaining estate was made at its appraised value to Robert Dyson, their agent, and he on the same day reconveyed it in divided portions to the three daughters, no doubt according to the valuation and partition agreed on, on the 21st of October, 1829. We find in the deeds that are in evidence, that after all the debts (and of course the legacies) had been paid, there remained for the heirs four hundred and twenty-seven (427) distinct pieces of property, which were deeded to the heirs, or to Robert Dyson, to wit; 19 in payment of the debt said to be due by the estate of James R. Smith to the estate and daughters of Hannah; 106 for the one-third part of their share in the property; 94 pieces to James C. R. Smith for his fourth part in the estate of his father, the testator, and for his fourth part of the debt of this estate to the estate of his mother, and two hundred and eight pieces of property in the fictitious sale to Robert Dyson.

These two hundred and eight pieces of property were the "reserved estate" of James R. Smith, of which he gave to his three daughters and their husbands the life estate, or, as he calls it, "the income," and of which he gave the fee to

their children. It is well known to our adversaries that the children of Mr. Matthew St. Clair Clarke, for irrefragable moral and legal reasons, and the children of Mr. Duncan, who is still living, and whose interests were efficiently protected by their father and did not suffer by this kind of management, never could make any claim on this account against the estate or legatees of James Boorman. But far different is the case of these complainants. Their father was under the absolute control of Matthew St. Clair Clarke, and so was his mother, both being perfectly ignorant of the attempts made upon their rights, and unable to resist them if they had known or understood them. The facts constituting the frauds were not undiscoverable, as is said by one of the authorities we are going to recite, in *rerum natura*, but equity, under the circumstances of this case, will undoubtedly conclude that the acts of the executors and the daughters of James R. Smith had greatly and designedly obscured the transaction, and that a *cestui que trust* like G. A. D. Clarke could not be compelled, required, or expected to abandon his business and family in Washington and to spend years in New York city to inquire into and ascertain his interests there, of which the trustees had failed to give him any account or explanation.

Indeed, after having attentively examined a great number of decisions of the equity courts of England and the United States, we have not found a single case that more strongly appeals to the equity powers of the court. This is a case where a young and helpless relative was sacrificed to the necessitous situation of a Washington dinner-giver, and was sacrificed with the utmost contempt.

This conduct of Matthew St. Clair Clarke, who perpetrated the fraud, and of James Boorman, who permitted it, satisfied with the indemnity stipulation already sufficiently mentioned, argued a contempt of the authority, or of the willingness of the courts of the United States to vindicate such wrongs. And now, in order to vindicate the courts of

Great Britain and of the United States from such imputation, we submit the numerous authorities we have promised, showing what such courts think of such conduct of trustees or executors, and of the subjects immediately in view, to wit: confirmation, ratification, and lapse of time.

In *Bond* vs. *Hopkins* (Schoales and Lefroy's Rep., 439) the Chancellor (Lord Redesdale) refused to apply the plea of length of time, or of the statute of limitations, upon grounds which partly appear from the following extracts. "The only remaining question is, whether length of time since the decree of 1770 operates at all, conscientiously, or by that analogy to the provisions in the statute of limitations which has been applied by courts of equity to their proceedings. The first is out of the question. This must be taken to have been an abominable conspiracy to deprive the heir of H. Boad, whoever he might be, of the property in question. It has unavoidably been in part successful by means of the provision which enabled the parties who held it to fight the right owner with his own property. Therefore there is nothing in point of conscience to protect the possession of the defendants.

3 Abbott Nat. Dig., p. 224, No. 128: Absence of the complainant and a late discovery of the fraud affording the grounds for suit. Held to account for and excuse delay and apparent laches in prosecuting the claim. Hallett *vs.* Collins, 10 How., 174.

Ibid, p. 224, p. 129: Lapse of time does not operate against minors, especially when they reside in a different State and had no knowledge of their rights. Ware *vs.* Bush, 1 McLean, 533.

A very instructive case on the subject of lapse of time, what constitutes notice to the defrauded party, and what degree of diligence is required of him, is that of Charter *vs.* Trevelyan, in 11 Clark & Finelly's Rep. of cases decided in the House of Lords, in which three judges concurred, who then held or had held the office of Lord Chancellor. A solicitor

had purchased nominally for a relative certain property belonging to a client of his. The purchaser immediately reconveyed to the solicitor, and in the conveyance it was declared that the solicitor had furnished the purchase money. These facts were not discovered until 37 years afterwards, and then the former client filed a bill against the representatives of his former solicitor, who had died 17 years before, to set aside the conveyance and have an account, and it was held (p. 714) that the circumstances of the transaction were of a fraudulent nature, and therefore furnished an answer to the objection arising upon the length of time during which the transaction had remained unimpeached

On page 734 Lord Chancellor Lyndhurst is reported to have said: "It is contended on the part of the appellants that Lord Trevelyan must have known that Thomas Charter was the purchaser, from the circumstance that some members of his family visited Seaton: that Mrs. Trevelyan and her husband had resided some time in the manor house, which had been rebuilt by Thomas Charter; that Edward Trevelyan had sported over the manor with Thomes Charter's permission: and that these facts must have come to the knowledge of Sir John Trevelyan. But I think no safe inference can be drawn from these circumstances. The visits did not take place, as I collect from the evidence, till several years after the sale. Sir John Trevelyan lived at a distance, and if he continued to take any intererest in the property, there was nothing to lead him to suppose that Thomas Charter might not have been acting as agent for James Charter with respect to it, or that he might not have become a purchaser or a part purchaser of it from him. As to the court of the manor being held in Thomas Charter's name, it does not appear that this was known to Sir John Trevelyan."

On page 739 Lord Campbell concurs in this opinion, and says, page 746: "For the reasons which have been stated so very lucidly by my noble and learned friend the Lord Chancellor, I am obliged to come to the conclusion that the

remedy in this case is not barred by the lapse of time, and that the parties have never, with a knowledge of the facts, done anything which can be considered as an acquiescence in the matter complained of. I therefore must conclude in the words used by my noble and learned friend (Lord Cottenham,) when Master of the Rolls, and I think it is impossible that any language can more clearly or strongly express what is the just result of this case. He says: 'It does, indeed, become the duty of the court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, and to consider what evidence there may have been, which from lapse of time may have been lost. But beyond this, *in cases of fraud, I think time has no effect.* Were it otherwise, the jurisdiction of the court would be defeated, not because the case was not one for its interference, but because the author of the fraud had been enabled to continue his deception till such a time had elapsed as to prevent the interference of the court. Such fortunately is not the law; and those who may be disposed fraudulently to appropriate to themselves the property of others may be assured that no time will secure them in the enjoyment of their plunder, but that their children's children will be compelled by this court to restore it to those from it had been fraudulently abstracted.'"

We quote from Lord Manners' decision in Aylward *vs.* Kearney, 2 Ball & Beatty, 476:

"It is a very material circumstance, with a view to the length of time that has elapsed before this bill was filed, and it is clearly proved that Benjamin Kearney, during his life, had unbounded influence over this young man; that after his death, which happened in 1785, to the time of the death of Peter Aylward, which happened in 1792, he lived with John Kearney, upon the same terms and in the same manner as he had done with Benjamin Kearney, continuing subject to the like control and influence.

Ibid, p. 477. "As to the length of time that has elapsed, it is a circumstance that has weight in this court, and es-

pecially on the principles stated by Mr. Sergeant Day, that the party may have lost the benefit of his evidence, from the delay of the plaintiff in not sooner bringing forward his claim. I was referred to the case of Beckford *vs.* Wade as stating the law on that subject, but I rather think the opinion of Sir William Grant in Gowland *vs.* De Faria, (17 Ves., 20,) contains the doctrine more applicable to this case. He says: 'He believes there is no case in which during the continuance of the *same situation in which a party has entered into the contract, acquiescence is gone for anything.*' I had occasion to act upon this doctrine in Roche *vs.* O'Brien, and the same principle is laid down by Lord Eldon in Hatch *vs.* Hatch, (9 Ves., 292.) Now, what was the situation of Peter Aylward? A minor till 1779, under the guardianship and control of his grandfather, which influence continued down to 1785, and then transferred to John Kearney, who exercised it till the death of Peter Aylward in 1792. This was a continuance of the original pupilage. John Kearney got the lease of Shank Hill, and Peter Aylward lived with him in his own house, upon the same terms he had done with Benjamin Kearney, his grandfather, and there was no interruption whatever of the state of influence and pupilage in which Peter Aylward continued during his life. John Kearney exercised a most unbounded influence over him, and according to Gowland *vs.* De Faria and Hatch *vs.* Hatch, to which latter case this bears a strong resemblance, length of time under such circumstance can go for nothing."

What says Lord Eldon in Hatch *vs.* Hatch? Not that time began to run from the period of the ward attaining her age of twenty-one, but after she had ceased to live with her guardian.

In Murray *vs.* Palmer (2 Schoales and Lefroy, 473,) the same great master of equity (Lord Redesdale) decided, according to the syllabus, as follows: "A conveyance obtained from a woman, in ignorance of her rights, and upon misrepresentation of the circumstances of the property, set aside, although she was of full age and acquiesced in the sale and received the interest of the purchase money for twelve years, although she consulted with her friends and had their assent, they being in equal ignorance with herself."

But this case is too important and instructive to permit us to stop at the syllabus. We therefore submit the following extract from the decision itself, wherein Lord Redesdale dwells upon the obscurity of the transaction and the difficulty of getting at the facts:

"The title of the plaintiff to relief would be, therefore, clear, if her application had been recent. But two things are insisted upon: first, that she having received the interest of this money whilst single during two years and a half, and then she and her husband having received principal and interest after her marriage, these acts are to be taken as a confirmation of the transaction. Now I take it that nothing will amount to a confirmation of a fraudulent transaction *but an act done by the party after he has become fully aware of the fraud that has been practiced.* I do not mean to say that the party should be aware of all the circumstances of the transaction, but he must be aware that the act he is doing is to have the effect of confirming an impeachable transaction; otherwise the act amounts to nothing as a confirmation.

Then there is the acquiescence down to 1800, during the whole time that John Chawner lived. If the transaction had been one in which the interest of John Chawner himself had been involved, so that the interest of Palmer would be affected by this acquiescence, or his situation altered by it, it would be very important; but that is not the case, and therefore this acquiescence amounts to mere lapse of time. I do not see that the plaintiffs had not the same means of gaining information before that they had at the time of filing their bill. Nothing is said of any new discovery; the whole comes out on the view of the instruments and the answers of Palmer. Probably Murray, the husband, originally, knew nothing of the case except the bond, and took that as his wife's fortune. With respect to her, she seems to have been as much in ignorance at the time of her marriage as ever, except that she understood that this was a very valuable purchase made by Palmer. It appears that Palmer, at the expiration of four years, let the estate to great advantage. This probably excited some conversation on the subject, and produced an investigation of the title, and when investigated it turns out to be founded on gross misrepresentation. Now the misrepresentation appears completely only from the production of the deeds, and therefore, until that

production, the case never fairly came, with all its circumstances, within the knowledge of the plaintiffs. One part of the case which has struck me very much came out only on the production of the receipt for rent for 136*l.*, namely, that it bears date prior to the conveyance by John Chawner.

"Under the circumstances, I think the lapse of time very much excused by *the* OBSCURITY of the transaction."

In 8 De Gr. McNaghton & Gordon, 149 Wright & Vanderplank: "As to the time which has elapsed, if the case had relied on time only, much might have been said in favor of the plaintiff's claim. Having regard to the case of Hatch *vs.* Hatch, I donot whether, on the ground of lapse of time alone, relief could have been refused to the lady herself if she were alive. *The case, as to her, would have been met by the proof of a continuance of the confidential relation up to the marriage*, and of the disability of coverture since."

In Smith's case, *in re* Reese River Silver Mining Company, Law Rep., Appeals in Chancery, 632, Lord Justice Turner, says: "But I think improper delay would be imputed to him for not having filed his bill immediately after he received the letter of December 30, 1865, and for this reason, that although that letter, or rather the enclosure in that letter, stated that the property was almost valueless, it said nothing as to what the state of the property had been, and therefore it might well be, that though when the directors got out to the country they found the mine was valueless, it might have been a producing, valuable mine when the prospectus was issued; and I think he would not have been justified in filing this bill on the information which he had then received."

In the same case, Lord Cairns says, p. 613: "I agree with the Master of the Rolls, that if in that state of things he had immediately filed his bill without waiting for the report or for the return of the deputation, he might well have been charged with precipitancy." (Doggs *vs.* Cameron, 3 Story, 733.)

In Sharp *vs.* Leach, 31 Beavan, 491, the syllabus says: "A purchase of a reversionary interest by a brother from a sister at an undervalue, set aside twenty years after the purchase and ten years and a half after the reversionary interest fell into possession, the influence of the brother continuing until a year before the bill filed. A voluntary settlement by a sister on her brother and his family, subject to a limitation to her for life, with remainder to her issue, set aside, on the ground that the brother, on whom the burthen was cast, had not proved the necessary requisites to support it."

And in that case, on the point of lapse of time, the Master of the Rolls expressed himself in the following manner, (p. 507: "Next, as to the lapse of time; this is considerable, it is nearly ten and a half years since the reversion fell in. *In ordinary circumstances, this would be very material,* but the circumstances and correspondence to which I have referred, relating to the deed of 1855, satisfy me that the influence of this gentleman over his sister was in full force at that time at least, and the evidence shows that it extended to a much later period."

"I think that this is a very material circumstance, which the court must regard in considering whether this deed ought to be supported or not. It is obviously reasonable to conclude that the influence which vitiates the act of the person over whom that influence is exercised, *should also, as long as it lasts, cause the omission of that person to complain of that act, obtained by such influence.* It is quite different from cases where the parties are opposed to one another. Here the influence does not appear to me to have been removed until within about two years before the bill was filed, and this is not a sufficient time to take away the plaintiff's right to complain."

In Browne *vs.* Cross, 14 Beav., 112, the court dismissed the bill on account of lapse of time, because they had long slept upon their rights with full notice of them. That case shows what amounts to notice.

In the case of Mulong *vs.* L'Estrange, Bentley's Rep., 412, the Lord Chancellor said, p. 414. "I have found no case in which a bargain made in direct contravention of the policy of the court has been allowed to stand, merely because it had been submitted to for many years." There are many cases in which relief has been given after a great lapse of time, and at 5 Ves., 484, 7 Ves., 599, 10 Ves., 423, 18 Ves., 120.

It is by no means an uncommon practice with eminent judges, when a question of peculiar interest and importance is presented, to review all the most instructive cases upon the subject. This was done by the distinguished equity Judge Desaussure, in the case of Butler *vs.* Haskell, 4 Desaussure, 651, which was somewhat analogous to this case, and we beg leave to quote extensively from his remarks:

Page 684:

"It must be remembered in the consideration of this question, that the rules at law and in equity are quite distinct. That eminent chancellor, Lord Hardwicke, says expressly, that this court will relieve against presumptive frauds; so that equity goes farther than the rule of law; for there fraud must be proved, and not presumed only—and that to take an advantage of a man's necessity is as bad as to take advantage of his weakness— 1 Atk., 352; and Lord Chancellor Eldon agrees with him. He says, though there had been a strong inclination in Westminster Hall, in the time of Lord Mansfield, persuaded to it by Judge Buller, to say that whatever is equity ought to be law, this has been reformed by Lord Kenyon; and that the clear doctrine of Lord Hardwicke, and all his predecessors, was that there are many instances of fraud that would affect instruments in equity, of which the law could not take notice." (See 1 Vesey, and Beames, 98.)

Page 708:

"But the grand reliance of the defendant's counsel was on the deeds executed by the three Butlers, in February and March, 1813, which are called deeds of confirmation. These

deeds refer to the decree which was delivered at Georgetown early in February, 1813, which established the rights of the Butlers. They recite the agreement in June, 1804, by which four of the Butlers contracted to transfer their rights to the defendant; and that, in pursuance of that contract, they severally transfer and convey their shares of the estate in question to the defendant. These deeds were executed in the presence of respectable witnesses, who prove that the deeds were explained to the plaintiffs. But there is no evidence that the Butlers were more enlightened or less necessitous than they were originally. There is no evidence that they were informed that their rights being established, and no appeal made, each share of the estate was worth from twelve to fourteen thousand dollars. It is not pretended that these men were informed that they were free to confirm the original contracts or not; and that the original transaction not being sustainable at law or in equity, they could be relieved from it. On the contrary, they seem to have gone on under a persuasion that they were so bound by the original contracts that they could not be relieved, and they therefore executed any papers drawn up and presented to them by the defendant, in order to get the stipulated price.

"That the complainants thought themselves legally bound to go on appears by the wording of the deeds, and they allege the fact in their bill. The defendant in his answer admits that they thought themselves bound, both legally and fairly. Now, I understand the doctrine, as to confirmation, to be quite settled, that the party who gives them must be shown to be no longer under those circumstances of necessity, or of overbearing influence, or blind confidence, which led into the first agreement; and that he is aware that he is not bound by the original contract, but may be released from it; but that, nevertheless, he chooses deliberately, and without imposition, to confirm what he had first done. To this it must be added, that in many cases, particularly of great abuses of confidence, confirmations are not allowed to have any effect. A short examination of the decided cases will illustrate the doctrine.

"In Ardglass *vs.* Muschamp, 1 Vern., 237, a release and confirmation were decided to be of no avail in a case of great inadequacy and imposition on a weak man. The lord keeper hesitated at first about interfering with the contracts, however unjust; but upon searching for precedents, from the

time of Lord Bacon, he became satisfied; and after two rehearings decreed that the contract, though executed and confirmed, should be set aside, adding, emphatically that if he were to die immediately he would make that decree. So in Ardglass *vs.* Pitt, 1 Vern., 439.

"In Wiseman *vs.* Beake, 2 Vern., 121, the court relieved against an unconscientious bargain, by which the plaintiff, a remainder-man, had agreed to pay ten for one of the money advanced if his uncle, who was tenant for life, with remainder to his issue male, should die without such issue in the lifetime of the seller. The vendor was a man of thirty years of age, trained in business, and not weak; but he was necessitous, and the price grossly inadequate. The confirmation in this case was of the strongest kind; for the defendant (Beake) had filed a bill, in the uncle's lifetime, against the plaintiff, Wiseman, to compel him to repay the money advanced with interest, or to be foreclosed from relief against the bargain; and in his answer thereto he said that he elected to stand by the bargain, which had been fairly made, and that he would not seek any relief against it, and this confirmation was relied on. But the court said that when he had spent the money a specious offer was made to him to relinquish the bargain on payment of principal and interest, which it was impossible for him to do, and that this was a contrivance to double-hatch the cheat, and the court set aside the contract.

"In this case there was no pretence of weakness in the plaintiff, or imposition practised upon him; nor was he a young heir. But he was necessitous, and selling an expectancy at a most inadequate price. This was considered conclusive; and the confirmation made whilst the necessity lasted was of no avail.

"In Taylor *vs.* Rochford, 2 Vesey, sen., 281–2, the court of exchequer decided that a bargain of about three for one was unconscientious, and should be set aside. The vendor was a poor ignorant sailor selling his prize money. A very deliberate confirmation was set aside, and the court said that confirmations, though made over and over again, would be broken through if they were not obtained properly.

"In the case of Stanhope *vs.* Toppe, 2 Bro., P. C., 183, the Lord Chancellor Macclesfield decreed that deeds obtained by artifice (though no direct proof of fraud) from a weak man, who confided in the other party, should be set aside,

notwithstanding a subsequent release, and notwithstanding the answer denied fraud. The decree was affirmed on appeal.

"Baugh *vs.* Price, 3 Wilson's Reports, was decided by the court of exchequer; and it was decreed that several successive articles, deeds, and conveyances should be set aside. It was the case of an attorney who purchased an estate for half its value from a man who was tenant in tail in remainder, (his father being tenant for life, but old and infirm,) and in necessitous circumstances. The attorney had been previously employed confidentially by the family. He drew the deeds himself, and the other party had no counsel or attorney concerned for him. It was relied upon for the defendant that letters from the vendor to defendant, written after his father's death, showed that he thought the bargain a fair one; but the court said that the letters were written soon after his father's death, before his eyes were open, and before he knew the real value of the estate. Reliance was also placed on this, that the party alleged to be injured had filed a bill after his father's death to be relieved, and defendant had put in an answer denying the fraud charged; and afterwards the plaintiff consented the bill should be stopped, and he then executed a deed reciting that the purchase was a fair one, and he confirmed and released the premises to the vendee—and the party lived several years without ever questioning the last transactions. But the court said that under the circumstances of the case the release and confirmation could not be supported, for the party was never fully apprised of his rights. The whole transaction was set aside, though the party was of competent age, capable of transacting ordinary business, not at all intoxicated. But he was in necessitous circumstances, and had confidence in the other party. In Walmsley *vs.* Booth, 2 Atk., 25, Lord Hardwick, on a rehearing, disregarded an acquiescence of six years by the party aggrieved, and by his representative, who allowed a judgment to be obtained on the bond, improperly obtained; and the chancellor set aside the bond and judgment. At the first hearing the Lord Chancellor refused to interfere, but on a rehearing he used these words, so honorable to his candor: 'Upon the case being reargued and reconsidered I am thoroughly convinced that my former decree was wrong.' In that case there was no weakness, but the man was in distressed circumstances."

"In the celebrated case of Fox *vs.* Mackreth, 2 Bro. C. C. 400, decided by Lord Chancellor Thurlow, affirming a decree of the Master of the Rolls, it was decreed that several successive deeds, amounting to recognitions, and intended to operate as confirmations, should not be binding on the party who made them, over whom an advantage had been gained by another person, in whom he had confidence, and had employed him to sell his property. The advantage gained was not above one fifth of the value of the property, and there was no direct proof of fraud, which was also denied by the answer. The Lord Chancellor said the executing the subsequent deeds did not amount to a confirmation, 'as it was done without any knowledge in Fox that he could impeach the transaction;' and he cited the cases of Baugh *vs.* Price, Taylor *vs.* Rochford, and Cole *vs.* Gibson, 1 Vesey, sen., 503. In this case of Fox *vs.* Mackreth a distinction was taken which was important. It was stated that in the case of Janssen *vs.* Chesterfield and others, in which confirmations had been supported, there were clear acts of confirmation. But that in Fox's case the parties executing the second deeds were only carrying into effect the original contract, (*vide* p. 419;) and that the execution of the duplicates showed how much Fox was in the power of Mackreth. It was done for the purpose of getting something which might be called an act of confirmation, and Fox did not think he had not been fairly dealt with for several years after the transactions. So, in the case under our consideration, the execution of the papers, after the decree, now relied upon as acts of confirmation, were not intended as acts of confirmation, but as an execution of the original articles of agreement. The defendant expressly says that neither he nor the plaintiffs thought an act of confirmation necessary to give validity to the agreement, for that they thought themselves already bound.

"In Crow *vs.* Ballard, 3 Bro. C. C., 117, 118, and 1 Vesey, jun., 220, the Lord Chancellor refused to permit a confirmation to prevail, though made with such deliberation that one of the most eminent counsel arguing for the defendant said, 'If the confirmation in this case does not prevail there never can be a confirmation.' But the Lord Chancellor said, if a person, conceiving he has made a hard bargain, and knowing that the bond is bad, will give a new bond that will maintain the right of the holder, and that shall be a

good confirmation; 'but not any act done under the influence of the former transaction, and under the opinion that that bond is good.' That the bond was given under the influence of the former transaction, and the payment of interest on it is of no avail, being still under the same impression. Surely this was precisely the case of the plaintiffs, the Butlers. They believed themselves bound, and signed any papers presented to them; and such acts cannot amount to confirmations.

"In Deloraine *vs.* Brown and others, 3 Bro. C. C., 633, which was the last case decided by Lord Chancellor Thurlow, the bill charged fraud. A demurrer was put in on the ground that the transaction had been confirmed by deed twenty-three years since. But the chancellor disallowed the demurrer. He said it did not appear that the complainant was undeceived at the time of the confirmation, which was made whilst the party remained in the same distress that he was originally. But he also disallowed the demurrer because, *proprio jure*, length of time was no reason for a demurrer.

"The case of Purcell *vs.* Macnamara was decided by Lord Eldon, and afterwards by Lord Chancellor Erskine, assisted by the Master of the Rolls. It was decided and affirmed that several deeds executed at large intervals, should not prevail as confirmations; the other party being throughout under the same influence, control, and ignorance of their rights, and every instrument signed under the same blind confidence.

"In Picket *vs.* Loggon, 14 Vesey, 214, conveyances, releases, and even a fine, were set aside on great inadequacy, combined with great misrepresentation, to parties in great distress and ignorance of their rights. A bill had been filed and dismissed on the plaintiff's not appearing to prosecute it, which was a very strong act of acquiescence. The answer denied all misrepresentation, or that the defendant possessed any knowledge withheld from the plaintiffs. But all this was of no avail when it appeared that the plaintiffs were poor and ignorant, and that the defendant had extracted conveyances for property worth 5,000*l.* for about 1,000*l.* The chancellor said, that this court protected on public principles persons in distress, who, acting under the influence of that distress, though with knowledge of the cir-

cumstances, are to have the same protection as if they were entirely ignorant, being compelled by hard necessity.

"The same doctrine is laid down by Lord Chancellor Redesdale in Murray *vs.* Palmer, 2 Schoales and Lefroy, 474. He says that nothing will amount to a confirmation of a fraudulent transaction but an act done by the party after he has become fully aware of the transaction. He must at least be aware that the act he is doing is to have the effect of confirming an impeachable transaction; otherwise the act amounts to nothing as a confirmation.

"The application of the doctrine of these cases, to which our reason assents, is conclusive of the case we are to decide upon. The Butlers thought themselves legally bound to go on and complete their ruinous bargain, and, therefore, signed these papers, which are called confirmations, but which do not come under that character, as stated by the judges; for they were not aware that the original acts and contracts were impeachable, and from which they could be released. The papers executed were a mere completion of the original agreements by which they thought themselves bound, and not new and substantive acts of voluntary confirmation. Their ignorance and their necessities remained in full force."

In Ferris *vs.* Henderson, (12 Penn. Stat. Rep., 2 Jones, 53,) in the supreme court of Pennsylvania, "the defendants allege that the charges of fraud therein set forth are not true, and plead the statute of limitations as a bar to the plaintiff's claim, if he ever had one. The issue, therefore, is upon the validity of the statute, as a bar, under the facts set forth in the bill. The court below decided that the statute is a bar. The defendant does not answer that the fraud is not sufficiently set out in the bill, nor that the plaintiff had the means of discovering the fraud, but relies altogether on the statute as a bar, in the language of the plea, even if a claim once existed such as it is set out, and prays judgment of the court thereon. In equity, the statute of limitations begins to run from the discovery of the fraud, and not before." (Brabank *vs.* Smith, 2 Yan. and Col., 58; Story's Equity, sec. 1521.) In the case from Yan. and Col., Baron Alderson said: "In cases of fraud, the statute runs from the discovery, because

the laches of the plaintiff commences from that date, or his acquaintance with all the circumstances." The plaintiff may reply fraud to the plea of the statute of limitations, and avoid the plea. (Bank *vs.* Forster, 8 Watts, 12.)

* * * * * * * *

"But the court below says, that when the party might have discovered the fraud, the statute began to run, and fix the commencement of the period in 1810, when the plaintiff was discharged, and cites a case from Pickering and from 3 Mass. Rep. These cases refer to circumstances where the defendants were guilty of supine negligence, and had the means of discovery in their possession, because all frauds are discoverable by evidence *in rerum natura*. It depends, however, on the intelligence, acuteness, and activity of the party. I have examined the case of Fairman *vs.* Brooks, in 9 Pickering, on which the court below rely. The court say, that the common law allows fraud, if not discovered within seventeen years before action brought, to be a good answer to the statute. Courts of equity do no more, except that they do not in all cases require a recent discovery to repel the statute, (p. 244, and on p. 246.) If the aggrieved party *knew the fraud when committed*, or had full possession of the means of *detecting* it, which is the same thing as knowledge, it will deprive him of his remedy. In that case the party had in his possession the books and documents which established the fraud."

In the case of First Mass. Turnpike *vs.* Field *et al.*, 3 Mass., 207, Chief Justice Parsons said: "The next question is whether the plaintiffs' replications, (for they are substantially the same,) disclose a fraud in the defendants sufficient to avoid their pleas of the statute of limitation. It appears that the defendants contracted with the plaintiffs to make for them, within a limited time, a turnpike within the *termini* stated in the contract; that the road was to be made on a firm foundation; that suitable materials were to be used; that the work was to be faithfully executed; that the defend-

ants proceeded to make the road, but they made it on a bad foundation, used unsuitable materials, and in fact badly executed the work; and that they fraudulently and deceitfully concealed the bad foundation, the unsuitable materials, and the work unfaithfully executed, by covering the same with earth, and smoothing the surface, so that it appeared to the plaintiffs and their directors that the contract had been faithfully executed. * * * I am, therefore, satisfied, although the plaintiffs' action literally accrued when the contract was to have been executed, yet these causes of action were fraudulently concealed from the knowledge of the plaintiffs until long after, and that the plaintiffs brought their action within six years after the fraud was discovered."

1 McLean: Heirs of Ware *vs.* Henry Brush, 558: "The right of the complainants is not barred by the statute of limitations, as they are residents of Virginia, and do not appear to have ever been in this State. The statute, therefore, does not run against them. But they were minors, and on this ground, if they were residents of Ohio, the statute would not be a bar."

Law Reports, vol. 1, Stanhope's Case, Lord Cottenham, p. 169, reasons thus: "That such a proceeding could not have been supported if questioned at the time it originally took place, was hardly contested. But if so, lapse of time makes no difference, for there is nothing to show that any of the other shareholders, still less that all of them, were aware of what had been done. It is said that by examining books and accounts open to their inspection, and consulting the list of stockholders as published from time to time, any shareholder might have discovered the truth. This is not, to my apprehension, very clear; but even supposing it to be so, that is not sufficient. It is no part of the duty of a shareholder to look into the management of the business. He has a right, acting on the terms of the deed, to leave the management in the hands of those to whom he had confided it,

and to assume that they are doing their duty. It is not enough to show that they might have become acquainted with the mismanagement of their affairs. It must be shown that they did so."

In 3 Desaussure, Crofts *vs.* Administrators of Townsend, the Chancellor said: "For even admitting the law to be as stated, that the statute runs in cases of frauds from the time of the discovery, (which, however, is to be taken with considerable restrictions and qualifications,) yet the facts in this case do not show that the discovery was made six years before the bill was filed. Mr. Harvey swore that, when questioned by two of the creditors, he gave them intimations of the state of case, and hinted that property could be made forthcoming. But he did not make that clear and full disclosure of the facts which could enable the creditors to see the nature and extent of the frauds committed. Nor could he, for Harvey did not know the whole of the fraudulent transaction. This, then, is not that full and complete discovery of the fraud which would enable the possessors of the property under the fraudulent deeds to shelter themselves under the protection of the statute."

In Wambursee *vs.* Kennedy, 4 Dess., 480, the same eminent judge says: "It appears that Dr. Charlton died in 1791, and his widow removed to Georgia very soon after, whilst her children were very young, and the mother died in a short time. They were at a distance from the scenes where these transactions had taken place, and from those persons who could give them information on the subject. Mrs. Thompson, who, together with her husband, might have informed them of their rights and of the unjust sale, swears expressly that she did not believe that the Charltons did not know their rights, nor of these transactions. And this proves, at least, that she and her husband had never communicated to them their knowledge of these facts. There is a strong presumption, then, that the Charltons had not discovered the fraud till recently. They state in their bill that

they were not informed till within one year of filing their bill; and there is no proof on the other side to induce a belief that they had any earlier knowledge. Then it would seem that though the statute of limitations will run even in cases of frauds, from the time of the discovery of the fraud, the statute has not had time to operate in this case since the discovery of the fraud."

The brief of the learned counsel of the defendants below stated that "the ancient rule as to breaches of trust exclusively cognizable in equity is that they must be prosecuted at the furthest within twenty years. Courts of equity have at all times, upon general principles of their own, even when there was no statutory bar, (to an action at law for relief in the premises,) refused relief to stale demands, where the party has slept upon his rights for a great length of time."

The distinguished author of that brief then refers in the tone of a passionate devotee to the science of the law, and with rapturous delight, to the great case of Cholmondeley *vs.* Clinton, reported in 2 Merivale, and enumerates the great number of eminent judges and lawyers who participated in the argument and decision of that case.

That decision is entirely inapplicable to the present case, because that was not a case of fraud, and ours is a case of gross fraud. To borrow the graphic language of our adversary, "we state this point sharply and distinctly," and it is proven by a simple reference to the decisions of three of the great men who took part in that case, viz: Lord Redesdale, who sat in the case on appeal in the House of Lords; Lord Chancellor Lyndhurst, and Lord Chancellor Cottenham, who, as Mr. Pepys, had been in Cholmondeley *vs.* Clinton, (Bligh's Rep., vol. 4, p. 1,) counsel for Lord Clinton, the successful party.

We prove it also by referring to the decision of Lord Redesdale in Murray *vs.* Palmer, and particularly by the case of Charter *vs.* Trevelyan, in 11 Clark & Finolly's Rep. of cases decided in the House of Lords, both heretofore cited.

This latter case, in which three lawyers who attained the dignity of Lord Chancellor emphatically expressed their views, is decisive on the question of limitation in the present suit. But although it was prominently exhibited in our brief in the court below, it received no notice from our opponent, any more than the case of Smith *vs.* Bell, 6 Pet., 68, which is decisive upon another branch of the case.

Our opponent further said: "The doctrine, (Cholmondeley *vs.* Clinton,) as held on the reversal of Sir Wm. Grant's decree, was that the analogy of equity to law is perfect, and that the longest limitation is that which bars a right of entry. It has been adopted in its whole length and breadth by the Supreme Court of the United States."

"Cur. by McLean J., Miller *vs.* McIntyre, 6 Pet., 65 to 67. Cur. by Ch. J. Marshall, Elmondorf *vs.* Taylor, 10 Wheat, 166 to 177."

These authorities are not applicable to our suit, for the same reason that Cholmondeley v. Clinton is not, viz: that they are not cases of fraud, and ours is. But a later case decided by the Supreme Court of the United States is applicable, and states what the law is in cases of fraud. (Michoud v. Girod, 4 How., 503.) On p. 561 the court say: "In a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the life-time of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

But we have said enough on this branch of the case and will conclude our argument by commenting, necessarily in detail and at some length, upon the 12th article of the codicil of J. R. Smith's will. This is the vital point in the case. It appears clear enough to us, but has been involved in so much confusion by the able counsel for the defendants below, that we deem it necessary to exhibit, in as clear a

light as possible, our interpretation of the testator's intention.

We contend that under the 12th article of the codicil the fee of the two-thirds of Jeanet's share of her father's estate, which two-thirds constituted her portion of the testator's "reserved estate," was devised to her son, G. A. D. Clarke, the grandson of J. R. Smith. This position we think we can establish, not only from the actual wording of the codicil, but also from the manifest intention of the testator, as ascertained from the context of the whole will, and by reference to the situation of the parties at the time of the making of the codicil.

The special clause of the 12th article of the codicil under which we make this claim, is the following: ——"and the remaining two-thirds of the portions or shares of my daughter shall be held *separate and distinct*, and not liable to the control, debts, or engagements of *either* of their husbands which they *now have* or *may hereafter* have, *as well those who are married*, as she who may hereafter marry, giving, however, to the husbands of either or all of them, in case the wife shall die first, either with or without issue, the income of said reserved part of my estate as long as he shall live, arising from his wife's portion, and after his death, then to the child or children of my said daughters, so dying," &c., &c.

The first difficulty of construction which arises in connection with this clause, is to determine the legal effect of the words "and after his death then to the child or children of my said daughters so dying," and the exact relation which they bear to the preceding sentences.

We do not hesitate to admit that, according to the strict forms of grammatical construction, these last quoted words should be considered as forming the closing part of the sentence, beginning with the words "giving, however, to the husbands," &c., and, judged by that standard, the counsel for the defendants and appellees was justified in en-

closing that whole sentence within brackets, as he did in his brief, and construing it merely as a parenthetical provision for a possible contingency. But strict rules of grammar are not the standard by which wills are interpreted. Chief Justice Marshall said, in the case of Smith *vs.* Bell, (6 Pet., 68,) that "whatever may be the strict grammatical construction of the words, that is not to govern, if the intention of the testator unavoidably requires a different construction," (4 Ves., 329, 57, 311,) and if we can show that an intention such as would flow from a strict adherence to the rules of grammar in the interpretation of this sentence cannot be attributed to the testator, without doing violence to reason and probability, we are entitled to disregard such rules, and to interpret the sentence in question as common sense, sound reason, and the circumstances of the case require.

According to the construction advocated by the appellees, the whole sentence would read thus: "and the remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct, * * * [giving, however, to the husbands of either or all of them, in case the wife shall die first, either with or without issue, the income of said reserved part of my estate as long as he shall live, arising from his wife's portion, and after his death then the child or children of my said daughters so dying,"]—and then follows certain provisions based upon the contingency of the daughters dying without issue, to which we shall advert further on.

Now, in the clause enclosed within brackets, what is the thing which the testator is "giving"—in other words, what, according to grammatical rules of construction, is the *subject* of the testamentary disposition? The fee of the two-thirds of each daughter's portion? Not at all. It is the *income* of each daughter's share of the reserved part of the estate, and this fact alone is sufficient to stamp as an absurdity the attempt to force a construction which requires that all of the words enclosed within brackets be taken as forming one pa-

renthetical sentence. For it cannot be pretended that the testator *intended* to leave the fee of said two-thirds undisposed of, and to give a life estate therein to the husband, and a life estate, and no more, to the surviving child or children. And yet this is the only possible *grammatical* construction of the sentence, as enclosed within brackets, if taken as a whole. Counsel for the appellees must have seen this, though he made no mention of. After insisting upon what, for convenience, we demoninate the grammatical construction of these words, he seeks to avoid committing himself to the absurdity involved in it by tacitly admitting that the words and after his death then to the child or children of my said daughters so dying " passed the fee to the child or children, but insists that the remainder thus created was a contingent one, limited to take effect upon the happening of one single contingency, namely : the dying of the daughter before her husband.

Now, we submit that this sort of irregular and illogical intepretation of a will is not justified by any rule of law or principle of justice. The sentence in question must either be construed grammatically, or it must not. We claim that the rules of grammar must yield to the manifest intention of the testator, and what that intention was we shall presently show ; but we insist that, if the sentence is to be grammatically construed, it must be rigorously and logically done. A party cannot be permitted to claim the benefit of such a construction for one purpose and to avoid it where it would injure him—to apply to the interpretation of a will a rule of construction which shall be liberal and elastic as to himself, arbitrary and procrustean as to his adversary.

We have seen that, if the words enclosed by counsel within brackets are to be taken as forming one sentence, the testator is made to give to his grandchild, or grandchildren, nothing but a life estate limited upon a life estate in the surviving husband, and to make no disposition whatever of the fee of the two-thirds which were to be held separate and dis-

tinct; but it is absurd to pretend that he had any such intention, and there is no rule of law and nothing in the will or codicil requiring such a construction. Nor can counsel avoid this dilemma by ignoring the necessary effect of his own act. The brackets are his; they are not in the copy of the will furnished to us, (Rec., p. 124;) the sentence thereby constructed into a parenthetical interjection is his; gramatically construed, it passes only a life estate, and by no mode or construction can it be made to pass a fee in that connection. It is, therefore, clear that the parenthesis has been improperly constructed, and that it must be confined to the words having a natural and direct reference to what must have been in the mind of the testator, the real and the only subject-matter of a parenthesis, viz: the provision for life for a husband who should survive a daughter. The clause, as thus amended, would read as follows: "and the remaining two-thirds of the portions, or shares of my daughters, shall be held separate and distinct, * * * [giving, however, to the husbands of either, or all of them, in case the wife shall die first, either with or without issue, the *income* of said reserved part of my estate, as long he shall live, arising from his wife's portion,] and, after his death, then to the child or children of my said daughter so dying," &c., &c.

It seems to us that the sentence, as thus constructed, clearly, though not very grammatically, expresses what must have been the intention of the testator. He had just given to his daughters, in full and absolute ownership, one-third of their portions of his estate, to be disposed of as they thought proper; then he had directed that the remaining two-thirds should be held *separate* and *distinct* and not liable to the control, &c., of their husbands, and undoubtedly was going on to devise the fee of said two-thirds to the children of his daughters, (and both Hannah and Jeanet then had children,) when it occurred to him that it would be not only fair and just, but wise and prudent, to make a provision for

life for the fathers and natural guardians and protectors of his grandchildren. This supposition is in accordance with reason and probability and in the line of common usage. It is claimed by the appellees that the testator neglected to provide for the contingency of the husband dying before the wife; and, further, that in consequence thereof, if the husband died first, the moment a child of the daughter attained the age of twenty-one years, whereby the limitation over, in favor of the testator's other children, was defeated, the daughter immediately took the fee of the two-thirds under the general direction at the beginning of the twelfth article of the codicil that his property shall be divided among his other children and their respective heirs; but a slight examination of these propositions will suffice to show how essentially they conflict with the real intention of the testator, as expressed in words, and to be collected from the context of the will.

The direction found in the introductory clause of the 12th article cannot have any effect, because the testator, in the subsequent parts of the same article, clearly indicated his intention that the two-thirds should be held *separate and distinct*, and that the fee thereof should never rest in the daughters.

In the case of Wright *vs.* Denn., on page 228, vol. X, of Wheaton's Rep., Mr. Justice Story used the following language: "In the present case there is no introductory clause in the will expressing an intention to dispose of the whole of the testator's estate. *Nor is it admitted* that such a clause, if it were inserted, would so far attach itself to a subsequent devising clause as *per se* to enlarge the latter to a fee, where the words would not naturally import it. Such a doctrine would be repugnant to the modern as well as ancient authorities. The cases of Frogmorton *vs.* Wright, (2 W. Bl., 889,) Right *vs.* Sidebottom, (Dougl., 759,) Child *vs.* Wright, (8 D. & E., 64,) Denn *vs.* Gaskin, (Cowper, 657,) Doe *vs.* Al-

len, (8 D. & E., 497,) and Merson *vs.* Blackmore, (2 Atk., 341,) are full to the point."

There are several circumstances which show that the testator did not intend that the daughters should, in any event, acquire the fee.

1st. The two-thirds were expressly directed to be held separate and distinct by the trustees.

2d. A life-estate therein was given, not only to the husbands then living, but also, in express words, *to any husbands whom they might thereafter have*, "as well those who are [now] married, [Hannah and Jeanet] as she who may hereafter marry," [Elizabeth.] Jeanet's husband died in 1824, about ten years after her marriage. What was to prevent her from marrying again? And suppose Jeanet had married a second time, after her son had attained the age of 21, would not the second husband have been entitled, by the express wording of the will, to a life-estate in her two-thirds?

3d. If any daughter died without leaving a husband, or a child, or grand-child, even though she had had a child who had attained the age of 21 years, but left no issue, the two-thirds were to go to the other children of the testator. Such, at least, was the *intention* of James R. Smith.

4th. The contingent remainder to the testator's other children was based upon the manifest intention, though only negatively expressed, that if the contingency provided for should *not* happen, that is, if a daughter being a widow, died, leaving a child who *should* fulfill the conditions of the bequest, viz., who should attain the age of 21 years, or who should die before that age, but leaving a child, then the fee should vest in such child or grand-child.

These provisions clearly show that the daughters were not intended to ever acquire the fee; and to refute the pretence that the testator neglected to provide for the contingency of

the husband dying before the wife, we need only refer to the provision expressly made for a second or third husband, and to the words "or if there be no husband living at her death," which occur in the sentence giving a contingent remainder to the other children. The intention of the testator is of supreme importance, and must prevail even over the legal import of the words used, unless to give effect to it would involve a violation of some fixed policy of the law, and such intention must be ascertained from the context of the will, and by reference to the situation of the parties. Now, what was the situation of the parties?

When James R. Smith made his very short will, on Januard 23d, 1817, he was quite ill, and evidently not in a condition to dispose of his large property as he wished, and, therefore, indicated therein his intention to amend it by a codicil or codicils, if he should recover.

On May 30th of the same year he did make a codicil which was four times as long as his original will, and consisted of thirteen articles, where he made various bequests to individuals for charitable purposes, and disposed of his whole property. At the time when this codicil was made, James R. Smith had a wife and four children. By the second article he made a liberal provision for his wife, and in article twelve directed how the residue of his estate should be divided among his four children. Of these children three were daughters, and one, J. C. R. Smith, a boy some fourteen years of age. Two of the daughters (Hannah and Jeanet) were married, and had a child or children. The other daughter, Elizabeth, was a minor and unmarried.

Now, under such circumstances, most men, in making a final disposition of the "rest, residue and remainder" of their estate, would simply direct that it be equally divided among their children. But James R. Smith was a peculiarly cautious and prudent man, and had very decided notions as to the propriety of placing property in the hands of young and inexperienced persons. It is true that the introductory

clause of the twelfth article contains a general direction that the residue of his estate be held by his executors in trust, to be divided among his four children and their respective heirs; but immediately thereafter he declares it to be his will that his son James "shall not come to the full possession and enjoyment of his portion of my estate until he shall arrive at the age of twenty-five years." In a like spirit of prudence he goes on to direct that his daughters shall have the privilege of expending and appropriating only one-third of their respective portions of his estate, and that the remaining two-thirds shall be held *separate and distinct*—for what purpose? Certainly not for the sole purpose of securing to the daughters the enjoyment of the property free from the control of their then or possible future husbands, since that object might easily have been attained by devising the property for the use of the wife for life, with remainder to her child or children; and, moreover, James R. Smith had no reason to fear any misappropriation of the property by his sons-in-law, Rev. John X. Clarke and Matthew St. Clair Clarke, in both of whom he no doubt had great confidence, and the latter of whom he appointed one of his executors. Nor was it for the exclusive benefit of the husbands, for, however fond James R. Smith may have been of his sons-in-law, it is not in reason to suppose that in the disposition of his property he would be guided by any very tender solicitude for their interests as opposed to those of their wives and children. They would probably have much preferred that the control of the two-thirds should have been given to them, so that they might profitably invest and administer the property.

What, then, was James R. Smith's object in directing the two-thirds to be held *separate and distinct?* It was, to our thinking, beyond any doubt, a fourfold object.

1st. He wished his daughters to enjoy a life interest in the property, secured against liability for any engagements or debts of the husbands.

2d. He wished to give to the then living or future husbands of his daughters, as the natural guardians and protectors of their children, a comfortable maintenance and support for life. With particular reference to this case, we may safely say that the testator fully realized that, in the ordinary course of nature, the husband of his daughter, Jeanet, would die before her; in fact, he even contemplated her marrying a second time. But, it occurring to him that if the daughter *should* die before the husband the care and control of her son, G. A. D. Clarke, would devolve upon her husband, he very naturally inserted in his will a reasonable provision in favor of the latter. From the fact that he directed that his son, James, should not come to the full enjoyment of his share of the estate until he attained the age of twenty-five years, it is evident that he was averse to the emancipation of young men at too early an age from the restraints of authority, and he was quite willing that his grandson, G. A. D. Clarke, then two years of age, should not inherit the property and be freed from the full parental control of his father, the Rev. John X. Clarke, until the death of the latter. And the same reasoning is applicable to the case of the other daughters.

3d. The testator clearly intended that after the death of both parents the children should take the fee of the respective two-thirds portions of his "reserved estate." We have already endeavored to show that this intention was actually expressed in the words "and after his death then to the child or children of my said daughters so dying;" but, whatever be the legal import of these words, it must, in a case like this, where no question of the violation of a fixed policy of the law can arise, yield to the manifest intention of the testator, and that, we think, from the whole context of the will, is not at all doubtful.

4th. He wished and directed that if a daughter should die without leaving a child or grandchild, then her portion, "after the death of her husband, or if there be no husband

living, at her death," should go and be divided among his other children. And is there not a clear intimation here that if the daughter should die leaving a child, or, in default thereof, a grandchild, the property was to go to such child or grandchild?

We believe that we have said enough to force the conclusion that the fee of the respective two-thirds was devised to the children of the daughter, but there is one rule of interpretation applicable to this case which ought not to be lost sight of, viz: that in the construction of a will effect must be given, if possible, *to every clause and sentence.*

The case of Smith *vs.* Bell (6 Pet., 68) is so perfectly analogous to the case now before the court, and throws so much light upon the proper construction of a will like that of our ancestor, James R. Smith, that we submit copious extracts from the opinion, thus dispensing with a more extensive display of authorities.

In that case Jesse Goodwin, the son of Britain B. Goodwin and Elizabeth Goodwin, claimed, after the death of Elizabeth, certain slaves which had belonged to his father. The court, through Ch. Just. Marshall, say (p. 74) that he claimed the slaves under the following clause in the will of Britain B. Goodwin: "also, I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies and funeral expenses, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely; the remainder of the said estate after her decease to be for the use of the said Jesse Goodwin."

Under this clause of the will the Supreme Court of the United States held, (p. 85,) "that Elizabeth Goodwin took only a life estate, by the will of Britain B. Goodwin, in the slaves belonging to the personal estate of the said Britain B. Goodwin, and that Jesse Goodwin had, by said will, a vested

remainder in the said slaves that would come into possession on the death of said Elizabeth."

The court was led to this conclusion by reasoning upon the will in the following manner, viz:

"In the construction of ambiguous expression, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words, and ascertaining the meaning in which the testator used them.

"In the will under consideration, but two persons are mentioned—a wife and a son. The testator attempts, in express words, to make a provision for both out of the same property. The provision for the wife is immediate, that for the son is to take effect after her death. The words of the will make both provisions, but it is doubted whether both can have effect. In the first member of the sentence he says, 'I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind and quality soever, after payment of my debts, legacies, and funeral expenses; which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and benefit and disposal absolutely.'

"It must be admitted that words could not have been employed which would be better fitted to give the whole personal estate absolutely to the wife; or which would more clearly express that intention. But the testator proceeds: 'the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin.' Jesse Goodwin was his son.

"These words give the remainder of the estate, after his wife's decease, to the son, with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son, as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence were

stricken out; yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. Either the last member of the sentence must be totally rejected or it must influence the construction of the first so as to restrain the natural meaning of its words; either the bequest to the son must be stricken out or it must limit the bequest to the wife, and confine it to her life. The limitation in remainder shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them.

"It is impossible to read the will without perceiving a clear intention to give the personal estate to the son after the death of his mother. 'The remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin.' Had the testator been asked whether he intended to give anything by this bequest to his son, the words of the clause would have answered the question in as plain terms as our language affords.

"If we look to the situation of the parties, to the motives which might naturally operate on the testator, to the whole circumstances, so far as they appear in the case, we find every reason for supporting the intention, which the words, giving effect to all, of themselves import." * *

"Notwithstanding the reasonableness and good sense of this general rule, that the intention shall prevail, it has been sometimes disregarded. If the testator attempts to effect that which the law forbids, his will must yield to the rules of law. But courts have sometimes gone farther. The construction put upon words in one will has been supposed to furnish a rule for construing the same words in other wills and thereby to furnish some settled and fixed rules of construction which ought to be respected.

"We cannot say that this principle ought to be totally disregarded; but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law."

On page 80 of the report of the case of Smith *vs.* Bell, the

Chief Justice cites 3 Wils., 141: "Cases on wills may guide us to general rules of construction, but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills."

We submit that the case of Smith *vs.* Bell is in every respect directly in point in the case now before the court, and that none of the cases cited by the defendants below are. At the risk of undue repetition, we will state again the circumstances of that case: Britain B. Goodwin, the testator, gave to his wife, Elizabeth, all his personal property to and for her use and benefit and disposal absolutely, the remainder of the said estate, after her decease, to be for the use of Jesse Goodwin, who was their son. Upon the trial the question arose whether, by the will of the said Britain B. Goodwin, said Elizabeth Goodwin had an absolute title to the personal estate of said Britain B. Goodwin, or only a life estate; and also whether said Jesse Goodwin, by said will, acquired a vested remainder that would come into possession on the death of said Elizabeth, or whether said remainder was void."

The court say on page 75: In the will under consideration but two persons are mentioned—a wife and a son. The testator attempts, in express terms, to make a provision for both out of the same property. The provision for the wife is immediate, that for the son is to take effect after her death. The words of the will make both provisions, but it is doubtful whether both can take effect. In the first member of the sentence he says:

"I give to my wife, Elizabeth G., all my personal estate * * * * to and for her own use and benefit and disposal absolutely."

Page 76: It must be admitted that words could not have been employed which would be better fitted to give the whole

personal estate absolutely to the wife, or which would more clearly express that intention; but the testator proceeds: "the remainder of said estate, after her decease, to be for the use of said Jesse Goodwin." Jesse Goodwin was his son. These words give the remainder of the estate, after his wife's decease, to the son, with as much clearness as the preceding words give the whole estate to his wife. The will of James R. Smith, under consideration in this case, contains a very similar provision in favor of ultimate beneficiaries—his grandchildren—only much more clearly expressed. The first article of his codicil devises all the remainder of his estate to his executors, in trust, that the same shall be equally divided among his four children, share and share alike, and *to their respective heirs.*

Thus the first part of this will, as the first part of the will of Britain B. Goodwin, seems to bequeath the property absolutely to certain parties, though in our case the words, "their respective heirs" point out the intention of the testator to benefit some other parties. But how thoroughly is not that first article of the codicil modified and restricted by the closing part thereof: "I further direct that my daughters, Jeanet, Hannah, and Elizabeth, if she should arrive at the age of twenty-one years, shall have the privilege of expending and appropriating, by and with the consent of the executors, one-third part of their portion of my estate herein devised to them in such manner as they may think proper, and over which, when so appropriated, they shall have absolute control, and the remaining two-thirds of the portions or shares of my daughters shall be held *separate* and *distinct*, and not liable to the control, debts, or engagements of either of their husbands, which they now have, or may hereafter have, as well those who are married as she who may hereafter marry, giving, however, to the husband of either or all of them in case the wife should die first, either with or without issue, the income of said *reserved part* of my estate, as long as he shall live, arising from his wife's portion, and

after his death, then to the child or children of my daughter so dying; and if either of my daughters shall die without lawful issue, or having issue which shall not attain the age of twenty-one years, and without issue, then the share or portion of my said daughter after the death of her husband, or, if there be no husband living at her death, shall go and be divided among my other children, share and share alike, and to their issue in case of the death of either of them, share and share alike, such issue to take the portion that would have belonged to his, her, or their father or mother."

It must require a painful effort of mind to misunderstand the obvious meaning of these very clear, though not very artificially expressed, testamentary dispositions. The testator intended to divide his estate among his four children *per stirpes*, but in the case of the daughters, the fourth accruing to each of them was not to become her absolute property, but only one-third part thereof, the other two-thirds of each respective fourth portion of a daughter's he called his *reserved* estate. Nothing in the codicil authorizes the inference that the daughter could ever become the absolute owner thereof. It was to be enjoped by her in her lifetime, and after her death to go to her child. But if she died without leaving a child who had attained the age of twenty-one years, or who, dying before he or she attained that age, had left no issue, then this reserved estate was to go to the other descendants of said James R. Smith. An intermediate beneficiary was interpolated into these provisions—the existing or the future husband of the daughters, who were to enjoy, in case they survived their wives, the use of the two-thirds of the fourth of James R. Smith's estate, accruing first to the daughter and wife, and then to their children. But the children and the grandchildren of the testator were the immediate objects of his solicitude and of these provisions.

It is remarkable how the reasoning of Chief Justice Marshall in Smith *vs.* Bell applies to a testamentary disposition drawn up like the codicil of James R. Smith. He says, (6

Pet., 76,) alluding to the wording of Britain B. Goodwin's will; "These words give the remainder of the estate after his wife's decease to his son, with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make *a future provision for his son* as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last members of the sentence were striken out; yet both clauses are equally the words of the testator, are equally binding and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled than that the whole will must be taken together, and is to be so construed as to give effect, if it be possible, to the whole. Either the last member of the sentence must be totally rejected, or it must influence the construction of the first so as to restrain the natural meaning of the record; either the bequest to the son must be stricken out, or it must limit the bequest to the wife and confine it to her life. The limitation in remainder shows that, in the opinion of the testator, the previous words had only given an estate for life. This was the sense in which he used them."

"It is impossible to read the will without perceiving a clear intention to give the personal estate to the son after the death of the mother." "The remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin." "Had the testator been asked whether he intended to give anything by the bequest to his son, the words of the clause would have answered the question in as plain terms as our language affords." "If we look to the situation of the parties, to the motives which might naturally operate upon the testator, to the whole circumstances so far as they

appear in the case, we find every reason for supporting the intention which the words, giving effect to all, themselves impart.

"The only two objects of the testator's bounty were his wife and his son. Both must have been dear to him."

The cases referred to by the Chief Justice in this opinion are also very much in point, particularly 5 Ves., 347, and 2 Black. C., 380.

Now, in the present case, in order to sustain the construction contended for by the appellees, the court would have to disregard entirely, and virtually strike out, (1,) the words in the 12th article of the codicil conferring so expressly, and in such unambiguous terms, a life estate upon the possible future husbands of the daughters who were then married, and (2,) the words in the final clause of said article: "or if there be no husband living at her death," for it is claimed by the appellees, as an evidence that J. R. Smith did not intend the grandchildren to take the fee unless the *wife died first*, that the testator did not contemplate the death of the husband before the wife—an assertion which the first quoted words effectually disprove.

But no court will undertake to expunge sentences from a will for the mere convenience and advantage of one set of adverse claimants, nor will it do so at all where the object which such sentences seek to accomplish does not contravene any policy of the law and is reconcilable with the general intention of the testator as manifested by the whole context of the will.

To sustain the claim of the appellees, the 12th article of the codicil must be amended, mutilated, and distorted. According to our construction, it reads as a clear, harmonious whole, requiring no emendations, (except, perhaps, of grammar,) no interpolation of brackets, and no suppression of words or sentences.

The counsel for the appellees, in the court below, undertook to make a will for J. R. Smith, which he wished to have

substituted for the actual will. Hoping that we may be permitted the same privilege, we venture to submit what we believe would have been the language of J. R. Smith in the 12th article of the codicil, if, instead of making provision for four children of both sexes and different ages and conditions, he had been providing for the case of his daughter Jeanet alone, viz:

"I further direct that my daughter, Jeanet have the privilege of expending and appropriating, by and with the consent of the executors, one third of her portion of my estate, herein devised to her, in such manner as she may think proper, and over which, when so appropriated, she shall have absolute control; and the remaining two-thirds of the portion or share of my daughter Jeanet shall be held *separate and distinct*, and not liable to the control, debts, or engagements of her present husband, John X. Clarke, or of any husband whom she may hereafter have, giving, however, to her husband, in case she should die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from the said Jeanet's portion, and after his death, then to the child of said Jeanet now living, my grandson G. A. D. Clarke, or such children as she may have at her death; and if my said daughter Jeanet shall die without any child living, or if my said grandson G. A. D. Clarke shall not attain the age of 21 years and shall die without issue, then the share or portion of my said daughter Jeanet, after the death of her present or future husband, or if there be no husband living at her death, shall go and be divided among my other children."

We have clearly followed the actual language of the codicil, the only alterations made being such as were necessary to make the words applicable solely to the case of Jeanet, and we ask, in all candor, whether any fair and unprejudiced mind can entertain a doubt as to what disposition Smith intended to make of the fee of Jeanet's two-thirds. He intended that it should go to the child or children of Jeanet, or their issue, and we challenge any one to twist and torture the *actual* language of the 12th article of the codicil into

the expression of an intention to give the fee to Jeanet on condition that her son should attain the age of 21 years. The attainment of that age was a condition or contingency that was to defeat the contingent remainder to the testator's other children and vest the fee indefeasibly in Jeanet's child or children and their heirs. It is preposterous to assert that that contingency was intended to benefit, not G. A. D. Clarke himself, but Jeanet, for whom ample provision for life had already been made The attainment by a man of his legal majority is generally supposed to work some particular benefit to *him*; but here we are gravely told that it was intended to work a positive injury to him for the benefit of others, and to entirely defeat his right to the fee of his mother's two-thirds. If James R. Smith had any such intention, it was equivalent to offering a premium upon mental matricide, for, according to this theory, we cannot help picturing to ourselves the children of his daughters longing for the death of their motheir before that of their father, in order that they (the children) might inherit the property. J. R. Smith had no such intention.

And S. Cambreling, Peter De Witt, W. C. Wetmore and Andrew Thompson, the lawyers of the parties to whom Jeanet sold her two-thirds—(no, not she, poor soul, but her unscrupulous master, Matthew St. Clair Clarke,)—in 1843, fully realized that the fee belonged to G. A. D. Clarke; else what sense or reason was there in their refusal to pass favorably upon the title, unless the latter gave their clients a full release? (Rec. pp. 91, 93–97.)

We think we have clearly established that our interpretation of the will is the correct one, and that the decree of the circuit court should be reversed.

Respectfully submitted,

LOUIS JANIN,
Of Counsel for Appellants.

Supreme Court of United States.

GEORGE A. CLARKE,
J. V. CLARKE,
v.
JOHNSTON & NORRIE,
Ex'ors of JAMES BOORMAN.
No. 164.

Brief of P. PHILLIPS,

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WILL OF JAMES R. SMITH, OF NEW YORK.

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for Appellants.

The appellants, who were complainants below, are the children (minors) of George Augustus Clarke, who was the only child of Jeanet Clarke.

James R. Smith, the father of Jeanet, made his will on 23 January, 1817, whereby he appointed Matthew St. Clair Clarke and James Boorman, his executors with power to sell the whole or any part of his estate, to pay his debts, and to distribute the remainder according to the law of New York, as *if he had died intestate.* p. 157.

A great change, not explained, seems to have taken place in the mind of the testator, for, on 30 May, following, he executed a codicil wholly inconsistent with the provision of the will, by which numerous legacies, bequests and devises, are made in favor of several individuals and corporations, of portions of his property, and then by the 12 clause he provides as follows:

"*Twelfth.*—All the rest, residue and remainder of my estate, of every kind and nature whatsoever and wheresoever situate, I give, devise, and bequeath unto my said executors in trust, that the same shall be equally divided to and amongst my four children, share and share alike, and to their respective heirs. My will further is, that my son James, and my daughter Elizabeth, shall each have the sum of fifteen hundred dollars set apart by my said executors for their support and education until they shall arrive at the age of twenty-one; and, if that sum shall not be found sufficient, my executors shall take such further sum from their respective shares of my estate as shall be necessary; and I do hereby give the tuition, care, and guardianship of my said son James, and my daughter Elizabeth to my said wife; my will further is, that my son James shall not come to the full possession and enjoyment of his portion of my estate until he shall arrive at the age of twenty-five years, nor shall he have the power to pawn, pledge, mortgage, or dispose of the same, or any part thereof, before the expiration of that time, but shall be entitled to receive the income arising from his portion between the years of twenty-one and twenty-five. I further direct that my daughters Jeanet, Hannah, and Elizabeth, if she should arrive at the age of twenty-one years, have the privilege of expending and appropriating, by and with the consent of the executors, one-third part of their portion of my estate, herein devised to them, in such manner as they may think proper, and over which, when so appropriated, they shall have absolute control; and the remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct, and not liable to the control, debts, or engagements of either of their husbands, which they now have, or may hereafter

have, as well those who are married, as she who may hereafter marry, giving, however, to the husbands of either or all of them, in case the wife should die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and after his death, then to the child or children of my said daughter so dying; and if either of my daughters shall die without lawful issue, or having issue which shall not attain the age of twenty-one years and without issue, then the share or portion of my said daughter after the death of her husband, or if there be no husband living at her death, shall go and be divided among my other children, share and share alike, and to their issue, in case of the death of either of them, share and share alike, such issue to take the portion that would have belonged to his her or their father or mother." p. 160.

The testator died very shortly after executing this codicil, leaving four children, a son James Smith, and three married daughters, among whom, was Jeanet, married to John X. Clarke, who then had one child living George Augustus, father of the complainants.

The question is, whether George Augustus took any interest under this 12th clause?

In resolving this, we are to be guided by the cardinal principle of giving effect to the intention of the donor. We are to take hold of the will "by its four corners," and when the intent is ascertained, the court is bound to give effect to it without it contravenes some principle or policy of the law.

In New York this rule of construction has been made statutory.

4 Kent's Com. p. 7.

In the opening of the 12 clause, all the remainder of

the testator's property, and all his title thereto, is devised to the executors. This is made subject to the trust, that when the debts and legacies were paid and the estate ready for a division, it should be "equally divided among my four children, share and share alike, *and to their respective heirs.*

If these last and italicised words had been omitted, the four children would have taken a life estate only, for the lack of words of inheritance. Such is the well established rule of the common law, and in the State of New York, where it is held, that before the statute (passed subsequently to the date of this will,) the law was conclusively settled, that when there was a devise to a person, without naming his heirs, or containing other words of perpetuity the devisee took only a life estate."

Christie v. Gage, 5 Lansing, 141.

Vanderzee v. Vanderzee, 30 Barb., 331.

So a devise to a man and his assigns without saying "forever," or a devise to several to be equally divided between them and their assigns, will carry only a life estate.

2 Co. Lit., 9. b.

1 Robt. on Wills, 424, W.

Nor would the additional words "to be fully possessed and enjoyed" enlarge the estate.

Wright v. Denn, 10 Wheat., 204.

The words "and to their respective heirs," as above used, evidently imply no more, that when the division took place, if one or more of the four were then dead, that the children of such should take their parents' share.

The word "heirs," when the intention requires it,

will be divested of its technical significance as a word of limitation, and converted into a word of purchase.

Chew's Appeal 37, Penn. St., 23.

In the case of Flournoy v. Flournoy, the devise was—"At the death of my wife A, I desire that one-half of my estate, real and personal, may be divided amongst my brother and sisters, and *their heirs forever.*

But it was held "that these latter words are used to designate with whom the division should be made in case of the death of any of the brothers and sisters, using them, *as words of purchase, and not of descent or limitation.*" 1 Bush., 526.

There is nothing in the subsequent portion of this clause which militates with this view. On the contrary, it is fully supported and strengthened.

After providing an annual fund for the support and education of James and Elizabeth to be taken "from their respective shares of my *estate,*" until they arrive at the age of 21, it declares, "that my son James shall not come *to the full possession and enjoyment* of his portion of my *estate,* until he arrive at the age of 25 years; nor shall he have power to pawn, pledge, mortgage or dispose of the same, BEFORE the expiration of that time, but shall be entitled to the income arising from his portion between the years of 21 and 25.

Here we have a clearly expressed intent to vest in his son a fee simple to one-fourth, after he had passed his minority and attained the age of 25 years.

How was it with the daughters? One of whom, Elizabeth, was likewise a minor, while the other two were married, their husbands then living.

Wholly different provision is made for them. Jeanet and Hannah, and Elizabeth (if she attained the age of 21

years) were "to have the privilege of expending and appropriating" *one third* of their share, *if the executors consented*, and over this one-third of a fourth, each was to have, when so appropriated, "*absolute control.*"

Here, again we have the clearly expressed, intent, not as with the son, to convey a fee in *the whole of* one-fourth, but to vest in each of the daughters a fee in *one-third* of a fourth only.

What then was done with the remaining two-thirds of a fourth?

Was this also to be a fee simple?

The answer is to be found in the words of this testator, "*the remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct.*"

Held by whom? By the executors invested by the terms of the will with the title?

It is then declared "that this remaining two-thirds, shall not be subject to the control or debts of the husbands present, or future, giving, however, to them, in case they survived the wife, the *income* for life, of this portion, which is emphatically described as the "RESERVED part of my *estate.*"

This right of survivorship was to be enjoyed by the husband, whether the wife died "with or without *issue*," and after her death, the wife's one-third of a fourth is devised "*to the child or children of my daughter so dying.*"

The testator as to this "reserved estate" had thus provided, first for the wife, then for the surviving husband, and finally for his grand children, some of whom (including George Augustus) were then living.

There is not an expression thus far, showing an intent that the daughters were to have a fee simple in this portion, which the executors were directed to hold "separate and distinct" as a reserved estate.

As a life estate only had been conferred on the daughters, there yet remained a disposition to be made of the estate in the event either of the daughters should die without children. Following then the provision, "after his death, then to the *child or children* of my said daughter so dying," comes the declaration—"and if either of my daughters shall die without *lawful issue*, or having *issue*, which shall not attain the age of 21 years without *issue*," then her share is to go to the testator's other children.

The plain intent of this is, that if the daughter should die without leaving a child or children living at the time of her death, or if leaving such child, that child should die before 21 years without leaving a child or children, then over to the *surviving* children of the testator specifically named by him in the will.

It is as if it had been said, should my daughter Jeanet die, "without lawful issue" before my daughters Hannah and Elizabeth, then her share is to go to my other daughter or daughters, as "survivor" or "survivors".

"It is too late, (says Cowan, J.,) to contend that a devise, to the survivor or survivors of another after his death without lawful issue, or any other clause of equivolent import, is void as being a limitation upon an indefinite failure of issue. The word survivor *or the like*, qualifies the technical or primary meaning of the words *dying without issue*, being considered the same as if the testator had added, *living at the time of his death*."

Culler v. Doughty, 23 Wend., 518.

And so says Fearne, "the signification of these words, ("dying without issue,") may be confined to a dying without issue *then living*, by *any clause or circumstance* in the will, which can *indicate* or *imply such intention*."

2 Fearne, 260—275.

The effect attached to the words "survivor," has been equally applied to the word "children." In this case the words are "my other children."

In Jackson v. Statts, the devise was "the remainder to be equally divided among my eleven children, and if any or more happens *to die without heirs*, then his or their shares shall be equally divided among the rest of the CHILDREN Held that the devise was good, by way of *executory devise.*

11 John, 337.

Abbott v. Essex Company, 18 How. 215.

Reading then the whole of the 12th clause, we find nothing to indicate the testator's intention to vest in his daughters a fee simple in his "reserved estate."

In construing a will, this Court has said: "that where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an estate for life only, unless from the language there used, or from other parts of the will, there is a plain intention to give a larger estate. We say a *plain intention*, because if it be *doubtful* or *conjectural* upon the terms of the will, or if full legal effect can be given to the language *without such an estate* the general rule prevails. It is not sufficient that the Court may entertain a private belief that the testator intended a fee. It must see that he has expressed that intention with reasonable certainty on the face of his will."

Wright v. Denn, 10 Wheat, 204.

"ESTATE."

It may be argued that by the devise of "all the *rest*, *residue*, and *remainder* of my *estate*" to the executors, to be divided, a fee simple was conveyed.

It is admitted that these words are frequently so construed when there is nothing showing a contrary intent.

The word "estate" may signify the property itself, without reference to the nature or extent of the interest therein, or it may point to the interest and title possessed thereto.

Jackson v. Robinson, 16 John, 586.

Fletcher v. Smiton, 2 T. R., 656.

"The intent with which it is used is the decisive consideration."

Lambert v. Paine, 3 Cr. 97.

It is clear, from reading the whole will, that, in the frequent use of this word, the testator intended property only. In such a case the intent controls.

Terry v. Wiggins, 47 N. Y., 512.

And this remark is equally applicable to the other words.

In Wright v. Denn, already cited, the will, as in this case, after giving certain pecuniary legacies, devised as follows; "Item, I give and bequeath unto my wife, M, *all the rest of my lands and tenements* whatsoever, whereof I shall die siezed, in possession, remainder, or reversion, provided she has no lawful issue; also, all and singular, my lands, messuages, and tenements, by her freely to be possessed and enjoyed."

The Court say—the question is whether the words "all the rest, &c.," import a fee. In the first place, this clause is open to the objection that it is not a residuary clause in the will, for no estate in the lands is previously given, and consequently, if it operates at all on the fee, it gives the entire inheritance, and not a mere residium of interest. And if a devise "of all the rest and residue of lands" in a clear residuary clause, was sufficient to carry

a fee, by their own import, it would follow, that almost every will containing a residuary clause, would be construed without words of limitation, to pass a fee. Yet the contrary doctrine has most assuredly been maintained. In Canning v. Canning, (Mosely, 240) the testator devised as follows;—"all the rest, residue, and remainder of my messuages, lands, &c., after my just debts, legacies, &c.; are fully satisfied and paid, I give to my executors in trust for my daughters;" and the question was whether these words passed an estate in fee, or for life, to the executors. The court decided they passed a life estate only. The authority of this case was fully established in Moor v. Denn, (2 Bos & Pull) in the House of Lords, where words equally extensive occurred; and the authority of this last case *has never* been broken in upon."

Suppose we are mistaken in this, yet the rule is well settled, that if "introductory words evince an intent to dispose of the whole estate, this will not enlarge an estate subsequently devised into a fee, unless the words in the devise are connected in terms or sense with the clause aforesaid, and import more than a description of the property."

Vanderzee v. Vanderzee, 30 Barb., 331.

The same principle is stated in another form—"a bequest to one of a *prima facie* absolute estate, but by a subsequent clause a remainder is given to another, the first takes a life estate only. The case of Smith v. Bull, (6 Pet., 68,) is referred to.

Baxter v. Bowyer, 19 Ohio, 490.

We have seen that the testator divided his estate into two parts; over one he gives his daughter absolute control "with the consent of the executors;" the other he denominates "the reserved part of my estate."

The son's share was given to him absolutely. Not so the daughters'. They were to have absolutely one-third only of their portion, and the other two-thirds were to go to the child or children of my daughter so dying" subject only to the right of a surviving husband to enjoy the income "of said reserved part of my estate, as long as he shall live."

Jeanet died, leaving George Augustus the father of complainants, her only child, and he attained the age of twenty-one years, and thus the description was fulfilled, and on the death of his mother, he was vested with the fee in her portion of the "reserved estate."

It cannot be, and has not heretofore been denied, that by the most explicit words, this would have been the result, had Jeanet's husband survived her.

If words are given to express thought and not to conceal it, the brain will be cudgelled in vain to find a reason why the testator limited his daughter to a life estate, and made her child the object of his bounty after her death, if her husband survived her, and withdrew that bounty if she survived her husband.

THE LIABILITY OF TRUSTEES.

There are cases in which joint trustees may permit some of their body to act, without incurring personal liability. But this is different from the case, when a trustee so conducts himself, as to throw the whole trust fund into the hands of his colleague, and to abandon the interests which it is his duty to correct. Any conduct of this kind is a dereliction from duty, and will make him responsible for consequent loss. If, for instance, he voluntarily aid his co-trustees to commit a breach of trust, or neglect to prevent such breach, &c., &c.

Adams Eq. 5 Am. Ed. 1868, p. 156.

If in any case there is a bona fide doubt as to the course which the trustee should pursue, he may obtain direction by a suit in Equity at the cost of the estate;—and a cautious trustee will generally do so, whenever a reasonable doubt exists.

When the trust is at an end, the trustee is bound to restore to the parties entitled, and for that purpose to make such a conveyance as they may require, receiving from them a release of his trust." Ib. 157.

"If the trustee convey the estate to another, without authority created by the will, or the sanction of the court, the conveyance will operate to pass the legal estate in the property; but the office of trustee, with all its responsibilities, will still remain unchanged in the original trustees, and they will continue answerable to the *cestui qui* trust for any breach of trust."

Hill on Trustees, 4 Am. Ed., pp. 279,–396.

These are the several modes by which a trustee may be discharged.

The expiration or full performance of all the trusts, and the conveyance of the property unto, or according to the direction of the *cestui qui trust.*

Although the trusts may not be determined, he may be discharged from his office by the concurrence of the *cestui qui trust.*

By the appointment of another in his place under a power contained in the trust instrument.

By his death, which releases his estate from any *future* responsibility—but until properly released it will remain liable for *past* acts.

Lastly, a trustee may be discharged from his office by the decree of the court.

What has been the conduct of Boorman?

In conjunction with his co-trustee, Clarke, he executes a deed on 15 Nov., 1829, which recites that James, the son, had reached the age of 25 years, and entitled, under the will, to his fourth part; that the debts were all paid, and that the parties desired to avoid a sale, and had, by mutual consent, divided the estate, by articles of agreement, entered into on 1 October, 1829; a conveyance is then made to James of the one-fourth part of the estate, in accordance with that division. p. 170.

On the same day, 15 Nov., 1829, these trustees execute a conveyance to Jeanet Clarke, which recites that by the terms of the will, the three daughters "should have the privilege of expending and appropriating, with the consent of the executors, one-third part of their respective portions as they may think proper, and over which, when so appropriated, they are to have absolute control;" and whereas, "that part of the real estate lying outside of the city of New York, parted and cleared as *one-third of the one-fourth part* devised and belonging (to said Jeanet) *in her own right*, amounts to $———, and that part in the city of New York, devised as the one-third of the fourth part devised and belonging to her *in her own right* amounts to $———; and whereas it has been agreed that the trustees should convey to said Jeanet "in full satisfaction of her said *one-third part of her portion, over which, when appropriated, she was to have absolute control as aforesaid.*" p. 193.

Similar deeds were executed to the other two daughters, all of which recite that the debts had been paid, that a sale of the property would b injurious, and that to avoid a sale, the parties had agreed to a division of the property.

Notwithstanding this, and although the trustees had

now conveyed to each of their daughters the one-third of the one-fourth which was devised to them, in their own right; and notwithstanding the debts were all paid, they, on the 26 December, 1829, executed their deed to one Dyson for all the remaining estate for the consideration expressed in the deed of $64,710.59. In this deed the son and daughters join. p. 205.

The title to the estate being thus vested in Dyson, he, on the same day, executed a deed to Jeanet of the one-third part of the property, to the "only proper use and benefit of the said Jeanet, her heirs and assigns forever," for the consideration expressed of $21,573.13. Similar deeds were on the same day executed by Dyson in favor of the other two daughters, and the aggregate of the consideration expressed in the three deeds is the precise amount of the consideration in the deed from the trustees to Dyson.

Boorman in joining in this deed to Dyson, when there was no need to exercise the power of sale conferred by the will, committed a gross violation of the trust imposed on him by the will.

The consideration of $64,710.59, was a sham. The effect of the arrangement was to vest the legal title in parties who had no right thereto, and so enable them to dispose of the property in violation of the provisions of the will.

Boorman was not unmindful of the risk he was incurring by so doing, for on the 10 July, 1830, he obtained from the parties an instrument under seal which recites the several conveyances he had made, and then gives a full release and discharge from all account and reckoning. Further, it contains a covenant "to save him harmless and indemnify him from any losses, claims or demands, by reason of his having made or

executed, or joined in the making or execution of the several deeds, indentures or conveyances hereinbefore mentioned," p. 239.

In the letter of Boorman, addressed to Charles E. Putnam, 31 May, 1859, referring to the deed to Dyson of 26 December, 1829, he says "such consideration, ($64,710.59) was the valuation of said two-thirds, and *the intent* of this deed was to close the estate *and to relieve me from the remote responsibility in the matter, in case the remainder over as to their two-thirds in any case took effect.*"

If the trustee desired to be released from responsibility—he should have applied to the court for that purpose; so if he was in doubt as to the effect of any provision of the will the court was his proper adviser. If he took upon himself the right to determine when and how to act, he is responsible to those who suffer wrongfully by his determination.

In this case he has acted by his own will, and conscious that he was incurring responsibility he has contented himself with a bond of indemnity to make good the loss he may incur.

If we are right in our construction of the will, he must account to the complainants for the losses his acts have produced, and must look to his bond of indemnity for redress.

LAPSE OF TIME.

Jeanet Clarke, the mother of complainant's father, died in 1847, leaving her son, George Augustus, who was born in 1815, and died in 1855. They both lived and died in the City of Washington. The bill was filed the 26 April, 1869, in the the City of New York.

The fraud was perpetrated in 1829, when Boorman executed the conveyance to Dyson, at this time the remainder man was but fourteen years of age.

The trustees, by the will, were vested with the whole estate. They were authorized to sell or lease the whole or any part thereof to pay the debts and legacies. This trust was not limited to the continuance of the life estate. The fee simple in the trustees being for an indefinite period, the estate limited in remainder was necessarily an *equitable estate.*

Creaton v. Creaton, 3 Sm. & Giff., 392.

Spence v. Spence, 104 E. C. L., 199.

The case is thus one of *express trust*, and within the peculiar jurisdiction of the Court of Equity.

The trustee has never been released or discharged; on the contrary, he admitted the continuance of the trust as late as 1861, when as trustee he sold certain stock belonging to the estate, and also received the dividends thereon. The amount of that stock cannot affect the question. Whether small or large, he dealt with it in his capacity of trustee alone. And this was long subsequent to the death of George Augustus.

In determining whether George A. knew of his right to this large estate, and that it had been wrongfully conveyed away by the trustee, and so knowing, acquiesced, or neglectfully omitted its prosecution, we must take into consideration his pecuniary condition. He was a husband and a father. His sole means of support was derived from the small salary he received as clerk of one of the departments. With sharp penury pinching him to the bone every hour of the day, it is incredible to suppose he had knowledge by which he could have restored his family to affluence, and abstained from benefitting by it.

The evidence collated in Mr. Janin's Brief leaves no doubt that it was but a short period before his death he

had a glimmering only of some undefined interest in New York property, that had belonged to his grandfather.

Not to repeat the citations made by Mr. Janin, on this head of the case I refer to a few elementary principles only.

In Hill on trustees it is laid down broadly, "that in cases of express trust, accounts have been decreed against trustees extending over periods of thirty, forty, and even forty-five years," p. 408.

This is subject to limitation, to wit: the continued existence of the relation of trustee and *cestui qui trust*. For it it is said, "although an express trust may once have been created, yet if the trustee, with *full knowledge* of the *cestui qui trust* have divested himself of that character by parting with the legal estate, and obtaining a release from the person beneficially interested, the court in the *absence of fraud*, would be very reluctant to entertain a claim where there has been such a lapse of time as in ordinary cases would constitute a bar under the statute of limitations," p. 409.

Again at p. 824 it is said:

"It has already been stated, that no acquiescence will predjudice a person who is ignorant of his rights, and equity has repeatedly relieved against a breach of trust, notwithstanding the length of express or implied acquiesence where the *cestui qui trust, has not had due information of the circumstances.*"

And further—"It lies upon the trustee, who rests his defence on the acquiesence of the cestui qui trust in the breach of trust, *to prove that he had due knowledge or notice of the facts.* But where there is doubt on that point, the court will refer it to the master to enquire as to the existence of such knowledge," p. 824.

And once again it is repeated at p. 825. "The statutes of limitation are no bar to the remedy of a cestui qui trust against his trustee, for a breach of trust. Although as we have already seen, a Court of Equity adopts to its fullest extent the analogy of those statutes."

The result is, "that the length of time which will protect trustees against a claim for past transactions will depend materially on the nature of the relief sought. If it be simply for an account without suggesting any cause of *fraud* OR *breach of trust*, a very few years would suffice, probably six in analogy to the statute of limitations."

"But where any positive *breach of trust* is suggested or *a fortiori*, any case of fraud, a much longer period will be required to operate as a bar; and we have already seen, that in general, the period of acquiesence in such cases will commence only from the *time when the party is made acquainted with his rights.*"

The actual number of years which will operate as a bar, will materially depend on the *relative circumstances of the parties, and the particular features in every case*, it being a matter *particularly in the descretion of the court*, to grant or withhold assistance." p. 901.

In Prevost v. Gratz, decided by this court, the bill was filed by the administrator of Croghan against the personal representatives of Michael Gratz, charging a trust in a deed from Croghan to Gratz, which was absolute on its face, and containing the usual covenants in such a conveyance. The deed was dated in 1770, with a consideration expressed of eighteen hundred pounds.

The attention of the court was first directed "to the consideration of the question whether this was a conveyance in trust, and if so, of what nature; and in the next place whether that trust was ever lawfully discharged." If say the court, "*there be still a subsisting*

rust there can be no doubt that the plaintiff is entitled to some relief."

After a review of the evidence, the court say, "Time which buries in obscurity all human transactions has achieved its accostumed effect upon this. The antiquity of the transaction—the death of all the original parties, and the unavoidable difficulties, as to the evidence, attending all cases where there are *secret trusts*, and complicit confidence between the parties, render it perhaps impossible to assert with perfect satisfaction, which of the two conclusions presents the real state of the case."

Further, "If the plaintiffs case be made out, there was a meditated breach of trust and a deliberate fraud practiced by Gratz on Colonel Croghan. If the sale to Howard was merely fictitious, it was an imposition designed to injure C's interest, and violate his confidence. If the frauds were clearly made out, there would be an *end to enquiry as to motives*. But the fraud is not clearly made out."

Under the circumstances of this case the great lapse of time, (40 years) was allowed to operate as a bar to relief, for it would be unreasonable, (say the court) after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be encumbered. And if the parties are dead, and the case rests in *confidence, and in parol agreements*, the most we can hope, is to arrive at probable conjectures, and to substitute general presumptions of laws for exact knowledge."

But the Court adds, "It is certainly true, that length of time is no bar to a *trust clearly established*; and in a case where *fraud* is imputed and proved, length of time ought not upon principles of eternal justice, to be admitted to repel relief."

6 Wheat, 481.

It is easy to see how readily the court would have disposed of the present case. Here this is an express trust created by will; a breach of trust in the execution of a deed of conveyance; and the suit is directly between the cestui qui trust and the trustees. Here is nothing for time to obscure, and the relief is not founded on the allegation of minute circumstances, made difficult by time to disprove.

The lapse of time therefore places Boorman in no worse position than if the suit had been instituted immediatly after the termination of the life estate.

If the lapse of time "will materially depend on the particular features in each case," (*supra.*) we submit, that no case was ever presented which so little called for the protection afforded by lapse of time, as the one now before the court.

The cases on this subject are too numerous to be cited and we content ourselves by referring only to—

Watson v. Saul, 1 Giff. C. R., 196.

Portlock v. Gardner, 1 Hare, 594.

Knight v. Bouyer, 2 De Gex & Jones, 421.

We submit that this question is to be determined as if Boorman was now in possession of the property claimed. That he has in violation of his trust conveyed the property to those who had no title thereto, should in nowise effect his responsibility to the rightful owner.

THE ACQUIESCENCE OF GEORGE AUGUSTUS CLARKE.

The answer avers on "*information and belief*," that all the property was conveyed by deeds in fee simple, and that it was held by the grantees, "with the full knowledge and acquiescence of said George, his heirs and descendants, for more than 21 years." p. 26.

That the said George, after he attained the age of 21 and before that time "had full means to conduct such investigation, and full and perfect knowledge concerning the estate of said James R. Smith, and of every deed conveyance, and settlement of, or concerning the said estate which had been made, or which is mentioned in the bill or answer, save the act of selling stock and receiving the dividends."

The answer very fully sets up the grounds on which an acquiescence could be predicated. They were necessary to be averred.

But what evidence has been produced to show that George was cognizant of the execution of the deed of 1829 to Dyson, (the breach of trust complained of) at the time of its execution, or that subsequently with knowledge he ratified or acquiesced in it?

We have only the memory of witnesses of an interview with George, had by lawyers representing adverse interests to him, in the city of New York, in the year 1843. That is near thirty years ago!!

This evidence when scrutinized, shows its own utter worthlessness to establish what the answer relies on—a ratification of, or acquiescence in the deed of 1829—with knowledge of his rights under the will of his grand father.

The brief of Mr. Janin deals with this subject, and all we need ask is, that *this evidence should receive the careful scruting of the court.*

The record contains five deeds, all executed at Washington, on 29 November, 1843; the first at p. 143, by which Jeanet and her trustee, Matthew St. Clair Clarke, convey to Peter Pinckney, a lot of ground in the city of New York for $1760.

The second, at p. 146, is a deed by the same, to the same, of another lot for the sum of $ 1,910.

The third, at p. 148, is a deed from the same to Quimby Quipp, of another lot, for the sum of $ 2,020.

The fourth at p. 151, a deed from the same to G. W. Gillett, of another lot, for the sum of $1600.

The fifth at p. 153, is a deed from the same to G. W. Martin, of another lot for the sum of $225.

These deed are all precisely alike in form and contain full covenants of warranty.

On the day of their date, they are all acknowledged by the grantors before W. Cranch, in the City of Washington.

The execution of the first, second, third, were proved in New York by said George, on the 2d December, 1843. The fourth and fifth on the 4th December. In his attestation he describes himself as a resident of Cumberland in the State of Maryland, and certifies that he saw the grantors sign the same and that he was a witness thereto.

All these conveyances contain the covenant that the grantors "are lawfully seized in their own right, of a good, absolute and indefeasible estate of inheritance in fee simple, in the above granted and described premises."

There is not the remotest allusion to the mode by which the grantors had acquired their title—nothing therefore, to put George on the enquiry as to his rights.

His witnessing these deeds during the life of his mother, can produce no effect without it is shown indepently, that he had knowledge of his rights under the will, and that he knew that the property conveyed was part and parcel of the estate devised to him.

The only other fact given in evidence by defendant, is to be found in a conveyance by George to Peter Pinck-

ney of all his right, title and estate, in and to the lot, conveyed by Jeanet and Matthew, (Supra) to said Pinckney.

This deed is dated 1 December, 1843, for the consideration of one dollar. It is witnessed by L. B. Woodruff, and was acknowledged on same day, before the Commissioner of deeds. p. 156.

Now the question to be resolved is, did George know of his rights under his grandfather, and did he know that this particular lot conveyed to Pinckney, was part and parcel of the property which under the will rightfully belonged to him ?

The witness to George's deed is the only witness produced at the trial to solve this question.

What was the doubt raised by the lawyers of the purchaser ? The witness says: "My *impression* is, that the question discussed between Mr. Thompson, Mr. Dewitt and myself was, whether Jeanet took an estate in fee; or whether her death without issue, would devolve the title upon her brothers and sisters, or their issue, and connected with that whether on the birth of issue, which issue should attain 21 years, her estate became absolute, whether it was so before or not; and hence whether if she had issue then living, who was 21 years of age, whether his conveyance would not remove all chance of doubt."

When asked the direct question, whether in his interview with George, the contents and nature of the will were spoken of, he replies—"My recollection is that the objections of the professional gentlemen, and the grounds thereof were explained to him, and that necessarily involved the will of his grandfather. *If he was present*, the points of the will were examined and gone into with some particularity. *If he was not present* I must have sta-

ted and explained to him that there was from SOMETHING arising under the will, that they wanted these papers called grants." p. 95.

He says, further: "I speak wholly from recollection. To what extent the history of the conveyances by which Mrs. Jeanet Clarke became the owner in severalty of the several lots came into discussion *I do not remember*. But the fact that she had come to own in severalty, or claimed to own, must have been *before our minds*. I have no distinct recollection that the instruments by which the partitions were effected were specially mentioned." p. 95.

Again he says—"as already stated, I had paid no special attention to the construction of the will, with a view to any argument or opinion thereon, I have no recollection that George made any opposition or objection to the execution of these grants which were proposed to him. I remember that he was *much gratified* by the closing of the transaction. I do not recollect he ever said, that he had any individual claim to the lots in question. *I presume* I explained the matter when he was asked to execute the grants, or he *may* have been present, at the interview with counsel making the objections. I told him of the objections the gentlemen had made. I do not remember whether he produced the will or whether Mr. Thompson produced it. I knew it was produced, and was before us, and I examined it. *I am not able to say whether the instrument itself was exhibited to Mr. Clark or not.*" p. 96.

At the conclusion of the examination, the witness adds: "I desire further to say, I have been called to this examination without having seen the will of James R. Smith for a considerable time, and not at all with reference to those enquiries, and without having been referred to any papers connected with the subject, except my own memorandum of the debts of the payments which I have

named and I have therefore given my statements from recollection only."

This addendum was a proper caution, considering that the witness was speaking of matters that had occurred near thirty years before.

The difficulty with Thompson, who had examined the title for Pinckney, is stated in his deposition. He says that in the interview with Judge Woodruff, "I told him that I had advised my clients not to take the title unless it could be shown, at least, that Jeanet Clarke had a child who had arrived at the age of twenty-one." p. 97.

This was the difficulty that was solved by what is termed the "grant" from George of the 1 December, 1843.

Here we have all that is offered by the trustees to secure him from a flagrant breach of trust, upon the ground that in 1843, the cestui qui trust knew of his rights under his grandfather's will, and that the property he was entitled to, had been conveyed to Dyson in 1829, and with this knowledge had deprived himself of it all, by acquiescing in the transaction.

Compare the feeble evidence offered, with the requirement of law. The party entitled to the benefit of a trust must also be aware of his rights, and acquiesce in being deprived of them.

And to displace his title to relief on the grounds of acquiescence or delay, "it lies upon the *defendant by distinct, and explicit evidence, to bring home to the plaintiff, the knowledge of the fact, on which the acquiescence* is *founded, and to which it refers.*" (Adams Eq. 163)

Prideaux v. Lonsdale, 32 Law Journal.

ASSIGNMENT OF ERROR.

The appellants assign for error the decree of the court, denying that George Augustus Clark took any interest under the will in this case, and dismissing the bill; and they maintain that the decree should have been in their favor.

P. PHILLIPS.
of Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1873.

No. 164—Equity.

CLARKE ET AL.,

Appellants,

vs.

JOHNSTON ET AL., EXECUTORS OF BOORMAN,

Respondents.

Appeal from the Circuit Court of the United States for the Southern District of New York.

ARGUMENT FOR RESPONDENTS.

CHAS. O'CONOR,

Of Counsel.

Evening Post Steam Presses.

Supreme Court of the United States,

IN EQUITY.

OCTOBER TERM, 1873.—No. 164.

JAMES B. JOHNSTON AND ADAM NORRIE, Executors of the last Will and Testament of James Boorman, deceased,
Defendants and Respondents,

ads.

GEORGE AUGUSTUS CLARKE AND JEANET VIRGINIA CLARKE,
Complainants and Appellants.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Brief of Defendants and Respondents.

I. Abstract of the case.

It was a bill in equity, filed by the complainant, April 26, 1869 (*Rec., pp.* 1–20). The original bill occupies the *Record from pp.* 2 *to* 20. For the answer thereto see (*Rec., pp.* 21 *to* 30).

The complainants sought to recover from the defendants, as executors of James Boorman, deceased, who was last surviving executor of their great-grandfather, James R. Smith, deceased, the present value of certain lands in the State of New York, of which their said great-grandfather, James R. Smith died seized (*Fol., Rec., pp.* 3, ; 253).

The plaintiffs were the children of George A. D. Clarke, deceased, who was the only child of Jeanet Clarke, deceased, one of the daughters of said James R. Smith, deceased.

The first and principal question in the case was, whether the plaintiffs' father, George A. D. Clarke, deceased, took anything by devise from said James R. Smith, deceased, his grandfather, in that part of his estate which was set off and allotted to his mother, Jeanet Clarke, pursuant to the testator's codicil, and therein denominated her "*reserved part.*"

The Circuit Court, per Blatchford, Dist. J., ruled in the negative. This conclusion, if correct, being decisive, the bill was dismissed, without any decision on the other grounds of defense (*Rec. p.* 252). Opinion, *Clarke* v. *Johnston*, reported in 8 *Blatchford's R., p.* 557). Also, at end of this Brief, (*p*).

The will and codicil are respectively dated January 23d and May 30th, 1817, and the testator died in June of the same year (*Rec., p.* 3).

The relative portions of said will and codicil are as follows:

Will (*Record, pp.* 120, 156, 157).

"I * authorise my Executors * * to sell * * at public auction or private sale the whole or any part of my * estate real or personal." It then directs his debts and all charges, &c., to be paid, out of the proceeds, and adds:

"The residue of my estate, unless the same or any part thereof shall be otherwise disposed of by Codicil or Codicils

* * I mean shall be distributed according to the laws of the State of New York in the same manner as in case I had happened to die intestate."

CODICIL.—(*Rec.*, *pp.* 3, 4, 123, 160.)

"*Twelfth.*—All the rest, residue and remainder of my estate of every kind and nature whatsoever and wheresoever situate, I give, devise and bequeath unto my said executors in trust that the same shall be equally divided to and amongst my four children, share and share alike, and to their respective heirs. My will further is that my son James and my daughter Elizabeth shall each have the sum of fifteen hundred dollars set apart by my said executors for their support and education until they arrive at the age of twenty-one, and if that sum shall not be found sufficient, my executors shall take such further sum from their respective shares of my estate as shall be necessary. And I do hereby give the tuition, care and guardianship of my said son James and my daughter Elizabeth to my said wife. My will further is that my son James shall not come to the full possession or enjoyment of his portion of my estate until he shall arrive at the age of twenty-five years, nor shall he have the power to pledge, pawn, mortgage or dispose of it in any way, the same or any part thereof, before the expiration of that time, but shall be entitled to receive the income arising from his portion between the years of twenty-one and twenty-five. I further direct that my daughters Jeanet, Hannah and Elizabeth, if she should arrive at the age of twenty-one years, shall have the privilege of expending and appropriating by and with the consent of the executors one-third part of their portion of my estate herein devised to them in such manner as they may think proper, and over which when so appropriated they shall have absolute control—and the remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct, and not liable to the control, debts or engagements of either of their husbands which they now have or may hereafter have, as well those who are married as she who may hereafter marry—[giving however to the husbands of either or all of them in case the wife shall

die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and after his death, then to the child or children of my said daughter so dying]—and if either of my daughters shall die without lawful issue or having issue which shall not attain the age of twenty-one years, and * without issue, then the share or portion of my said daughter after the death of her husband, or if there be no husband living at her death, shall go and be divided among my other children, share and share alike, and to their issue; in case of the death of either of them, share alike, such issue to take the portion that would have belonged to his, her or their father or mother."

None of the testator's children died without issue; and so the limitation over did not take effect. The testator's daughter Jeanet, mentioned in the codicil, who was the complainant's grandmother, survived her husband and died a widow, leaving in life said George A. D. Clarke, her only child, who afterwards died himself. He attained twenty-one years of age, and left issue. Under these circumstances, it was held below that she, Jeanet Clarke, was entitled to a fee simple in her "*reserved part.*"

This is the defendants' *First Point*. There is no issue on any fact connected with it. The argument on this point begins at page 5 of this brief.

If the defendants' testator committed or participated in any wrong, it was in so exercising the power of sale as to destroy the alleged remainder of George A. D. Clarke, the only child of testator's daughter Jeanet Clarke, in certain real estate. If done, all this was by acts in the life-time of said George A. D. Clarke, See the deeds alleged to have worked this evil (*Record, pp.* 205. 11).

The defendants asserted, in their answer (*Rec., p.* 30), that the right of action of such a wrong was the personal estate of the injured individual who, in this case, was George A. D. Clarke; that it did not descend to his heirs, but vested in his executor or administrator. This question is presented in the defendants' Second Point, and the argument of it begins at page 12 of this brief.

The defendants set up in their answer the New York

Statutes of Limitation, and long acquiescence and ratification by George A. D. Clarke (*Rec., pp.* 26 *to* 28).

The questions involved in these defenses are precisely the same which could have arisen under the ancient English Statutes of Limitation at Law, and the doctrines of English equity, with two exceptions only. Where a secret fraud was *concealed* by the wrong-doer until the ordinary remedy was barred by limitation, equity would relieve on a bill filed *within a reasonable time*, after the discovery. 2 N. Y., Revised Statutes of 1830, first ed., page 301, § 50, fixed this indefinite period at six years. The same section fixed the limitation in all other cases of exclusive equity cognizance at ten years.

The complainants contended that these statutes did not apply, for several reasons. *First*, because the claim was for a breach of trust, which no lapse of time would bar; *Secondly*, because the act of Boorman, was a *fraud*, which no time would bar; and *Thirdly*, because George A. D. Clarke, never discovered the fraud; was very poor, was subject to the control or undue influence of Matthew St. Clair Clarke, one of the executors, and because both he and his mother were weak minded persons. They further contended that the peculiar remedy in equity against a concealed fraud before adverted to, was allowable against a party who by *mistake*, committed or participated in injurious acts.

The defendants denied all *fraud*. (*Rec., p.* 24)

They asserted full knowledge of the material facts on the part of George A. D. Clarke; notice of all material facts to him and ratification by him of the acts complained of as vesting in his mother full control over her "reserved part." And they also denied the said allegations of control, undue influence and weakness of mind, &c. (*Rec., pp.* 27.)

The matter of limitation is argued under Third Point, page 12 of this brief.

First Point.

Jeanet Clarke, this testator's daughter, having survived her

husband, and died a *feme sole*, her son, George A. D. Clarke, took nothing by devise from James R. Smith, deceased.

I.—The provisions of the 12th clause of the Codicil above, placed within brackets, are all that indicate any intent in favor of any child of a daughter. They are as follows:

[" Giving, however, to the husbands of either or all of them in case the wife shall die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and after his death then to the child or children of my said daughter so dying."]

These words were inserted for a certain purpose, and to provide for a particular and clearly defined contingency. It would be an unsound construction to carry them beyond that purpose. These provisions plainly refer to the case of a daughter still remaining at her death subject to the common-law disabilities of coverture. They have no application to any daughter who might die a widow. In the former aspect they perform a sensible and useful office; in the latter they would be a very undesirable impediment to the daughter's maternal authority.

Per Kent, Chr., Van Alst vs. *Hunter*, 5 *Johns. Chy. R.*, 160.
Savage vs. *Tyers, Law Rep.*, 7 *Chancery*, 363.
Oke vs. *Heath*, 1 *Vesey, Senior*, 138.

This is the precise import of the words, and there is no reason for supposing a different intent; no provision is made for any children of a daughter, except after the death of a surviving husband, nor is there any indication that a thought was had concerning the children of any daughter, save in the single contingency of there being such a surviving husband. The nature of the contingency referred to is intensely clear, for it is twice described or characterized by the words of the codicil. The children who might take must be those of a daughter "so dying," *i. e.*, one who shall "die first," or before her husband. It is only after the death of a surviving husband that anything is said about giving anything to children of a daughter. Consequently, in this set of interbracketed words there is no *devise* to any child or descendant of Jeanet Clarke; and nothing of the kind can be found elsewhere.

II.—As the contingency did not *happen*, the *estate in Jeanet remained in full effect a fee*, according to the terms of the primary gift. The following authorities are submitted in support of this proposition :

Smither vs. *Willock*, 9 *Vesey Chy.*, 234 (1804).

Bequest to *testator's wife for life, and after* her death to be divided *equally between his brothers and sisters in equal shares*, but *in case of the death of any* in the lifetime of the wife, the *shares* of him or her, &c., so dying to be divided between his, her or their *children*.

One of the testator's brothers died in the *lifetime* of the testator's *widow*, without *ever having had* a child.

Held :—"Share of deceased brother was vested, subject to be divested only in the event of his death in the life of the testator's widow, *leaving children* : and consequently that event not having happened, *his representative was entitled*."

Harrison vs. *Foreman*, 5 *Vesey, Chy.*, 207 (1800).

Bequest to A, for life and after her decease to B and C in equal moieties, and in case of the death of either of them in the lifetime of A, the whole to the survivor of them living at her decease. B and C both died before A, intestate.

Held :—"Upon the first part of the will, if it stood without the condition annexed * * there could be no doubt I suppose that it would have been a vested interest, * * transmissible to their representatives, whether they survived the person entitled for life or died before her."

Did the bequest lapse by reason of the condition ?

"It is perfectly clear that where there are clear words of gift, giving a vested interest to parties, the court will never permit that absolute gift to be defeated, unless it is perfectly clear that the very case *has happened* in which it is declared that interest shall not arise. * * * There is a vested interest, the contingency upon which it is to be divested never happened, the vested interest therefore remains as if that contingency had never been annexed to it. * * * I could illustrate the principle

by putting the *case of a real estate*, * * given after the death of the tenant for life, to these two persons and their heirs as tenants in common, but if either of them dies before the death of the tenant for life, then to the survivor and his heirs. Putting it so, there is no possibility of doubt it would have been a vested interest in them, to be divested upon a contingency which did not take place."

Held :—The interests of A and B now belong to their administratrix.

Sturgess vs. *Pearson*, 4 *Madd. Chy.*, 411 (1819).

Bequest to "A during life, and *after her decease, I give* the same to be equally divided amongst her three children, or such of them as shall be living at her decease."

All died before A.

Question :—Whether children took vested interests, though they died before their mother; or whether their legacies were undisposed of?

Held: If words "or such of them," &c., had not been added, clearly they were vested interests. "If I were to indulge conjecture I might think the testator did not intend that the children should take unless they survived their mother, but where the expressions used are capable of a sensible effect it is not safe to depart from them. The vested interests first given by the will are, by the form of the expression, *only defeated in case there shall* be some or one, and not all of the children, living at the mother's death; but that event did not happen, for there was not one child living at the mother's death. The alternative branch of the sentence therefore fails, and the primary expression which gave vested interests to the children takes effect." See also

1 *Jarman on Wills*, *p.* 787, *Third Lond. Ed.*
Ib., *p.* 778, *Section III.*
Martin vs. *Martin*, *Law Rep.*, 2 *Eq. Cases*, 409.
Steen vs. *Steen*, *Irish Reports*, 6 *Com. Law*, 11.

III.—The reasons assigned for our position that Jeanet Clarke took a fee in the whole of her share, totally precluding any claim by her son as devisee or purchaser, have, thus far been founded solely on the words of the codicil. They are fully supported by a correct interpretation of those words; but if that ill-penned codicil should be thought to need aid, such aid can be found in the will. The testator in the will expressed himself in these words: "The residue of my estate, unless the "same or any part thereof shall be otherwise disposed of by "codicil or codicils * * I mean shall be distributed "according to the laws of the State of New York, in the same "manner as in case I had happened to die intestate."

Here is an express direction that the statute of descents and distributions shall have precise, absolute and full effect as it respects the shares and interests to be taken by his children, except so far as by some codicil, he, the testator, should otherwise dispose. Now, as to the shares which each child would take, he did not by his codicil vary from the disposition which the law would have made in case of an intestacy. Thus the law of inheritance and the express direction of the testator combined and co-operated to give Mrs. Jeanet Clarke an absolute interest in fee simple in one whole quarter of the testator's estate; and, except in the particulars in which it can be clearly seen and judicially determined that this law in favor of Mrs. Jeanet Clarke, established by the Legislature and adopted by the testator, has been set aside or modified by some subsequent arrrangement in the 12th Clause of the codicil, such prior gift must stand and in every respect govern her claim to the succession. *Roe* vs. *Hicks*, 8 *Bingham*, 475.—1 *Clark and Fin.*, 34.—*Robertson* v. *Powell*, 2 *Hurlstone and Coltman*, 762.—10 *Jur., N. S.*, 443.—*Williams* vs. *Evans*, 1 *Ellis and Blackburn*, 741.

IV.—It is not material to inquire whether Jeanet's interest in her "reserved part" was legal or equitable.

1. Except so far as the direction to hold to their separate use may affect the question, we have already shown that each daughter took a fee. That direction itself would simply create

an inactive trust, in no wise preventing the daughter from taking a direct legal estate in the reserved two-thirds, but for the necessity of protecting her enjoyment from the power of her husband during coverture. *Richardson* vs. *Stodder*, 100 *Mass. Rep.*, 528. At any time, when she was discovert, her estate would be *legal*. *Adams* vs. *Adams*, 6 *Ad. and Ellis, N. S.*, 866.

Trust interests are moulded by equity to effectuate the object, and where there is no object to give aliment to or uphold a trust save the protection of a married woman's interest from the actual or possible control of a husband, the special equitable quality will attach to the property and subsist during coverture only. It will not subsist at any other time. *Tullett* vs. *Armstrong*, 1 *Beav.*, 25.—*S. C. on Appeal before Ld. Chr. Cottenham*, 4 *Mylne and Craig*, 404 *to* 407.—*Hayne's Outlines of Equity, p.* 208 to 210, *Side paging, Law Library, col.* 98.

2.—But, in fact, it is quite idle to dwell upon the question whether Mrs. Jeanet Clarke's estate in the two-thirds of her share set off for her separate use, was legal or equitable. In either aspect it was equally subject to her absolute control and was alienable by her. The operation through the apparent sale to Dyson alleged to have been a mere device *per interpositam personam*, to vest in her a plain, easily marketable legal title, being her own act, was a lawful exercise of dominion by her over her own property. It was quite within her power to control, direct and dispose of the property as she saw fit. This is a familiar doctrine. In fact she was discovert when she exercised this dominion; but had she been a feme covert, her power of disposition over the property would have been just as great.

In point—*North* v. *Champernon*, 2 *Cases in Chy.*, 78, 79.
Barton v. *Briscoe*, *Jacob*, 605.
9 *Am. Law Register, N. S. Phila.*, 459, § 16.
Hopkins v. *Hopkins* (*in Note*), 2 *Jac. & Walker*, 19.
Croxall v. *Sherred*, 5 *Wallace*, 281.
2 *Lockwood's Bright on Husb. & Wife, p.* 220, §§ 1, 9, 10.

Atherly on Marriage Settlements, p. 334.
Meth. Ep. Ch. v. *Jacqus*, 17 *Johns.*, 561.
Barford v. *Street*, 16 *Vesey*, 134.
Cheever v. *Wilson*, 9 *Wallace*, 119, *and cases cited in Note.*

3. There is no more familiar, among familiar doctrines, than that (aside from particular cases provided by statute) inalienability of an estate or interest in property can exist in one case only, *i. e.* in the separate estate of a married woman secured by the well-known restraint upon anticipation. *Davidson* v. *Chalmers*, 33 *Beav.*, 659. That restraint can never be implied: it must be clear, definite and positive. 2 *Lockwood's Bright on Husb. & Wife, p.* 276, §§ 3, 6, 8, 26; *Burton on Real Property*, § 1391. And, besides, as above shown, the clause forbidding anticipation is wholly inoperative at all times whilst the woman is discovert.

4. It may not be amiss to say, in this place, that the provisions of James Smith's will, positively directing that his son should not come to the full possession and enjoyment of his share, or pawn, pledge or dispose of it, until he should attain the age of twenty-five years, were utterly nugatory. *Lovett* v. *Gillender*, 35 *N. Y.*, 617. The point is believed to be familiar; and therefore it is not thought necessary to cite other authorities. It is evident that the testator *supposed* his daughters would have no "privilege of expending and appropriating" their shares, or *any* part thereof, unless "by and with the consent of the executors."

But this blunder in law was, of course, equally inconsequential with the positive though temporary and void prohibition in respect to the son's share.

Our argument might very well end here; but we will go through with certain other considerations that might be invoked in case there was a devise to the issue or children of Mrs. Jeanet Clarke.

Second Point.

Mrs. Jeanet Clarke having died discovert, we wholly deny that upon any possible construction any interest in her share was devised to her son. But if a different view could be taken of the testamentary dispositions in question, the alleged devise to George A. D. Clarke, if any, was plainly a *legal* remainder. With this the executors had nothing to do. And in this aspect the only complaint he or his representatives could make would be that by improperly exercising their power of sale the executors had defeated the devise to him. This would have entitled him at law, or perhaps in equity, to an action for a pecuniary recompense. That right, whether enforceable at law or in equity cannot be otherwise regarded than as a mere pecuniary demand. If it existed, it was part of the *personal estate* of George A. D. Clarke. It did not descend to his *heirs;* it passed to his personal representatives, and could only be enforced through an action at law or suit in equity by *his* executors or administrators. This objection was duly taken in the answer (*Rec. p.* 29).

Story's Eq. Pleadings, § 504, *Note* 1.
Wisner v. *Barnet*, 4 *Wash. C. C. R.*, 642.
Seymour v. *Freer*, 8 *Wallace*, 214.
Nooman v. *Bradley*, 9 *Wallace*, 399.
2 *N. Y. Revised Statutes of* 1830, *First Ed.*, *p.* 113, §§ 1 *and* 2.

Third Point.

Any claim which could have existed against James Boorman, the defendants' testator, is barred by the New York Statutes of Limitation.

I.—The Circuit Courts of the United States, sitting in the States respectively, as a general proposition, administer in all the private controversies, the laws of such States respectively. *Nichols* vs. *Levy*, 5 *Wall.*, 444; *Christy* vs. *Pridgeon*, 4 *Wall.*,

203, 204. And, therefore, as Congress has not otherwise provided, the Statutes of Limitations adopted by the State of New York, must be applied to this controversy with the same effect as if it was pending in a Court of that State. *Martin* vs. *Smith*, *9th Am. Law Reg. of Philadelphia, New Series, p.* 701; *McClung* vs. *Silliman*, 3 *Peters' U. S. R.*, 277; *Harpending* vs. *Dutch Church*, 16 *Peters*, 486, 492; *Badger* vs. *Badger*, 2 *Wallace, S. C. R.*, 95; *Green* vs. *Neal's Lessee*, 6 *Peters*, 291; *Meade* vs. *Beale*, *Taney's Decisions, p.* 360.

II.—New York Statutes of Limitation.

As to claims of personalty, the remedy of next of kin and legatees or distributees in the State of New York, has been concurrent at law and in equity, ever since July 5, 1789, prior to the Federal Judiciary Act. The New York act of that date is contained in 2 *Greenleaf's Laws of New York, page*, 215, §§ 1, 6. With a slight variation in exclusion of redundancy, these sections are re-enacted in

1 *Kent & Rad. New York Revised Laws of* 1801, *p.* 540, § 18.

1 *New York Revised Laws of* 1813, *p.* 314, § 19.

These re-enactments are in the following words:

"That it shall be lawful for any person to whom any legacy of any sum of money or other personal goods or chattels, or residuary part of any personal estate, hath been or shall be given by any last will or testament, or who shall be entitled to any share on the distribution of the estate of any intestate, his executors or administrators, to recover the same, when due, in an action of debt, detinue or account, as the case may require, in any court of record in this State, if there be more than sufficient assets in the hands of the executors or administrators to discharge the debt of the testator or intestate; and in case of a legacy, if such assets be not sufficient to pay all the legacies that may be given, then an abatement shall be made in proportion to the legacies so given, and such person shall recover only a proportional part, and where such person shall be an infant at the time such legacy or share shall become due, such

action may be brought by guardian or next friend, as in other cases."

The New York Code of Procedure was first adopted in 1848. This was after the accruer of the alleged causes of action; and for that reason its rules of limitation do not apply (*Code*, § 73, *Laws of New York*, 1849, *p.* 631.) If applicable, they would not present any different question. The applicable statutes are in the New York Revised Statutes of 1830, and are as follows:

"No action for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of such action" (2 *Revised Statutes of N. Y., first Ed., A. D.* 1830, *p.* 293, *section* 5.)

"If any person entitled to commence any action in this article specified, or to make any entry, avowry or cognizance, be at the time such title shall first descend or accrue, either:

1. Within the age of twenty-one years; or,

2. Insane; or,

3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any term less than for life; or,

4. A married woman;

"The time during which such disability shall continue, shall not be deemed any portion of the time in this article limited for the commencement of such suit, or the making such entry, avowry, or cognizance, but such person may bring such action, or make such entry, avowry, or cognizance, after the said time so limited, and within ten years after such disability removed, but not after that period" (2 *New York Revised Statutes of* 1830, *first Ed., p.* 295, *section* 16.)

"The following actions shall be commenced within six years next after the cause of such action accrued, and not after:

Subs. 5. All actions for trespass upon land.

Subs. 7. All special actions on the case for criminal conversation, for libels, or for any other injury to the persons or rights of any" (*Same vol., p.* 295, *section* 18).

"If any person entitled to bring any action in this article specified (excepting actions against sheriffs or other officers for escapes) shall at the time the cause of action accrued be either

1. Within the age of twenty-one years, or

2. Insane, or

3. Imprisoned on a criminal charge or in execution under the sentence of a criminal court, for a term less than his natural life, or

4. A married woman.

Such person shall be at liberty to bring such actions within the respective times in this article limited after such disability removed." (*Same vol., p.* 296, *sec.* 24.)

Article Sixth.

Of the Time of Commencing Suits in Courts of Equity.

§ 49. Whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity, of any cause of action, the provisions of this title limiting a time for the commencement of a suit for such cause of action in a court of common law shall apply to all suits hereafter to be brought for the same cause in the court of chancery.

§ 50. But the last section shall not extend to suits over the

subject matter of which a court of equity has peculiar and exclusive jurisdiction, and which subject matter is not cognizable in the courts of common law.

§ 51. Bills for relief, on the ground of fraud, shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time.

§ 52. Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrued and not after.

§ 53. But if the person entitled to file any bill specified in the two last sections be at the time of discovering the facts constituting such fraud, or at the time the cause for filing such bill shall accrue, under any of the disabilities in the first and second articles of this title enumerated, the time during which such disability shall continue shall be excepted from the limitations contained in the two last sections in the same manner and with the like effect as such time is herein excepted from the limitations prescribed for commencing actions at law; and in case of the death of the person so entitled, during such disability, or before the expiration of the time herein limited for filing such bills, the same may be filed by the heirs or representatives of such person as the case may require, within the same time as allowed in the said first and second articles for commencing actions at law in the like cases." (*Same vol., pp.* 301 *and* 302.)

III.—In this Connection Dates have much Relevancy.

James R. Smith's will, January 23rd, 1817, (*Rec., p.* 3).

His Codicil, May 30th, 1817, (*Rec., p.* 3).

His death, June, 1817, (*Rec., p.* 3).

His will and codicil probated, June 11th, 1817, (*Rec., p.* 4).

Mathew St. Clair Clarke, died insolvent, May, 1852, (*Rec., p.* 17).

James Boorman died January 24th, 1866, (*Rec., p.* 15).

His will probated and Exrs. qualified, February 17th, 1866 (*Rec., p.* 15).

Jeanet S. Clarke, his daughter, the grandmother of complainants, died September 5th, 1847 (*Rec., p.* 7).

She became a widow September, 1824 (*Rec., p.* 7).

Her only son, George A. D. Clarke, testator's grandson, was born September, 1815 (*Rec., p.* 2).

Said George A. D. Clarke died October 14th, 1855 (*Rec. p.* 2).

Conveyance of "reserved parts" to Dyson, December 26th, 1829, or 9th July, 1830 (*Rec., pp.* 9, 10. See also pp. 13, 14).

This suit was commenced April 26th, 1869 (*Rec., p.* 1).

IV.—OTHER FACTS CONCERNING LIMITATION.

The defendant's testator, James Boorman, and Mathew St. Clair Clarke, a son-in-law of said James R. Smith deceased, were two of his executors, (*Rec., p.* 2). The complaint sets forth certain transactions by which parts of the real estate were conveyed to his children, as heirs or legatees of his widow, in satisfaction of claims by her estate against his estate (*Rec., pp.* 5, 7, 8). And some vague allegations are also made as to the dispositions of the personal estate and of other parts of the real estate (*Rec., p.* 6). But the complainant's alleged grievances are ultimately narrowed down as follows:

When the son of James R. Smith attained twenty-five years of age, the remaining real estate was divided into four parts, and his fourth was set off to him absolutely. One-third of each daughter's share was also set off to her absolutely, and the two-thirds part of each daughter's share, which the codicil directed to be "*held separate and distinct*," and denominated a "*reserved part*," was also set apart for her.

The complaint declines to "dispute the fairness" of this division and alleges that the after-mentioned conveyance by Robert Dyson to their grandmother, Jeanet Clarke, the testator's daughter, embraces such her "reserved part" (*Rec., p.* 11).

But it charges that pursuant to an agreement between the daughters and the executors, there was vested in the daughters by indirection an apparently clear, warrantable fee-simple in their said respective "reserved parts."

It is alleged that this was effected by an executor's convey-

ance to said Dyson, of all the three "*reserved parts*," for the nominal and pretended consideration of $64,710.50, and a reconveyance of the same date by Dyson to each of the said three daughters of the said "reserved parts."

The complaint sets forth in full Dyson's said alleged deed of reconveyance to Jeanet Clarke, the complainant's grandmother, and fastens upon the property thereby conveyed as her "reserved part" (*Rec., p.* 9, fol. 14, *pp.* 11 to 13 *incl.* and *p.* 19), claiming that her only child, George A. D. Clarke, deceased, who was their father, was entitled to this part as devisee in remainder after his mother's death, (*Rec., pp.* 5 and 9), the complainants allege that these conveyances to Dyson and from him to her, led to an effective disposition of the lands to *bona fide* purchasers, by which they or their father, George A. D. Clarke, lost his legacy, as they call it. (*Rec., p.* 15, fol. 22, and p. 16, fol. 24, and p. 17, fol. 26, and p. 19, and p. 20, fol. 30).

V.—Mrs. Jeanet Clarke died September 5th, 1847; George A. D. Clarke, her son, and only child, was then more than thirty years of age. If any interest in the property in question was devised to him by his grandfather, his right to full and absolute possession and enjoyment accrued at that time. He was then under no disability. His death occurred eight years subsequently.

Mr. Boorman died January 24th, 1866, and letters testamentary were issued to his executors February 17th, 1866. The bill in this case was not filed until April 26th, 1869, which, it will be perceived, was more than three years after the issue of such letters testamentary.

From the death of Mrs. Jeanet Clarke, to the commencement of this suit, was upwards of twenty-one years and a half.

If there ever was a right of action against Mr. Boorman, it accrued when, as the plaintiff alleges, he, innocently, in mistaken reliance on the judgment of a highly respectable and eminently learned lawyer, signed the deed to Dyson, nearly forty years before this suit was brought (*Arthur* vs. *Gayle*, 38 *Alabama, N. S.*, 256.) If the limitation was only set running at the subsequent date when George A. D. Clarke reached his majority, the lapse of time was more than thirty years. And if

we count from the year 1843, when he, then being of full age, had his consultations with Judge Woodruff, in New York, on the question whether he should insist upon any interest in himself under his grandfather's will as a bar to the alienation of the lands in question, by his mother, the lapse of time was more than twenty-five years (*Rec.*, pp. 93 to 96 inclusive). But it will be convenient to leave out of view all these longer periods, not merely of *laches*, but of positive acquiescence with full notice and knowledge, and to confine our attention to the statutes as applicable to the shortest term, that is to say, from the death of his mother to the commencement of this suit, being a little more than twenty-one years and a half.

By the Revised Statutes, when the remedy at law and in equity are concurrent, the same term of limitation is prescribed and where the remedy is exclusively in equity, the time allowed for bringing suit is at most ten years (2 *R. S.*, 302, § 53).

VI.—It follows that unless the case can be brought within the scope of some peculiar rule or principle, this statutory bar must be regarded as peremptory and conclusive; and thus we are brought to consider the special grounds in respect to limitation relied upon by the plaintiffs. They are two in number, and it will suffice for the present purpose to denominate them *trust* and *fraud*. We will examine each of these grounds separately.

It is said that this is a suit between trustee and *cestui qui trust*, and that, as between such parties, no lapse of time is a bar. Neither of these propositions is maintainable.

In the first place, we have already shown, that if anything was devised to George A. D. Clarke, by his grandfather, it was a direct legal estate in remainder, commencing at the moment of his mother's death, the executors never, at any time, holding in trust for *him*, or holding any trust relation to his remainder. The trust was only commensurate with their legal estate, if any they had; and that being merely for the mother's separate use, it must have ceased, at least upon her death. It will thus be seen that, as matter of fact, this is not a controversy

between trustee and *cestui que trust*. But if it was such a controversy, there is no such rule concerning lapse of time in that case, as is contended for.

1. "In cases of equitable title to land, equity requires relief to be sought within the same period in which an ejectment would lie at law; and in case of personal [or mere pecuniary] claims it also requires relief to be sought within the same period prescribed [by Statute] for personal suits [at law] of a like nature."

1 *Story's Eq. Jur.*, § 64 *a*.
Chapter IV. of Blanshard on Limitations, *p.* 61.
1 *Hovenden's Supplement*, *p.* 214, *asterisk paging, being note to Jones* v. *Turberville*, 2 *Vesey, Jr.*, 11.

Some Judges describe this rule of the Equity Courts as being in analogy to the statutes for the limitation of actions at law; but others dissent from this form of expression, and call it acting "in obedience to the Statutes of Limitation."

Cholmondeley v. *Clinton*, 4 *Bligh's P. C.*, 119.
Wagner v. *Baird*, 7 *Howard's U. S. R.*, 258.

The general language occasionally found in law-treatises that pure trusts exclusively cognizable in equity are never barred, imports nothing very peculiar. It is undoubtedly true that so long as a trustee remains in possession of the trust property or fund, and is confessedly in office as trustee, acknowledging the existence of the trust, and holding himself out as engaged in the due performance of his duties under the trust, he continues responsible to the *cestui que trust*, however long the latter have been supinely inactive in demanding accounts, &c. But this is upon a principle in relation to the limitation of judicial remedies concerning property which pervades our whole jurisprudence. It is not confined to controversies between trustees and *cestui que trust;* and it is in no wise peculiar to suits in equity as contradistinguished from actions at common law.

In all cases of claim for redress against an act of omission

which has operated in diminution of the claimant's property, it is held on sound principles of judicial reasoning, that limitation or prescription has its commencement, or inception, as a bar, at that point of time when the defendant assumed or first held an attitude of hostility to the claim in which he thenceforth persevered. Whether such adverseness exists, and when it first existed, depends, in every case, on the evidence.

a. In the case of an ordinary debt due upon contract, that adverseness exists, *prima facie*, at the moment there is a default in payment. But as long as the debtor continues to promise payment to his creditor, the *prima facie* evidence of an adverse attitude is repelled.

Allen v. *Webster*, 15 *Wend.*, 289.

b. The absence of this adverse attitude may appear in a multitude of ways. He who holds in possession the chattel or the land of another, but makes no claim, either expressly or inferentially, that it is his own, does not hold adversely; and consequently, limitation or prescription will not run against the owner. And in this connection there are several classes of cases where the possession being in its inception based upon a clear admission of the right or interest of some other party, the mere physical possession will not assume an adverse character until the possessor creates such adverseness by some distinct or unequivocal subsequent act denying such party's right, or by some omission of duty toward such party, sufficiently long continued, marked and palpable to be, in reason, accepted as a virtual denial. Classes of cases may be stated instancing this:

1st. One tenant in common is not assumed to enter adversely to his co-owners, unless he violently oust them. But long continued sole possession, taking *all* the profits, and in no way recognizing his co-owners, will, at last, give his possession the requisite adverse character.

2d. The entry of a tenant under a lease is subject to the same remark. But if he long claims his own, or refuses or

omits to pay his rent, and the lessor sleeps upon his rights, not suing in the former case or demanding in the latter, the tenant's possession will at last become adverse.

Willison v. *Watkins*, 3 *Peters*, 54, *esp.* 51.
Hovenden v. *Annesley*, 2 *Sch. and Lefr.*, 625.
Baldwin v. *Peach*, 1 *Young & Collyer*, 460, stating the twenty year equitable analogy in all these cases.

3d. A mortgagee in possession is also in this condition of presumptive subordination; but if he renders no account, *keeps* no account, nor in any way recognizes the mortgagor's right, his possession will in like manner become adverse.

Per Eldon, in Cholmondeley v. *Clinton* 4 *Bli.*, 23, 35, 71, 94; *Per Redesdale, Ib.*, 97.
Acc. Pearson v. *Pulley*, 1 *Cases in Chy.*, 102.
Approved, 7 *Johns. Chy.*, 113.

So held as to a pledge of stock after ten years under R. S. in *Roberts* v. *Sykes*, 30 *Barb.*, 173, *per Sutherland, J., at Special Term.*

Whether the possession or the attitude of a party, *quoad* the claim, is *adverse*, must always be essentially a question of fact, depending on the circumstances of the case under discussion.

In most of the cases above put by way of illustration, the initial stage exhibits a lack of adverseness. Consequently that feature requires to be brought out by the lapse of time, and either the occurrence of events indicating adverseness or the non-occurrence, during a long period, of events that in the natural course of human things must have happened, if adverseness sufficient to invoke the bar did not exist.

Of all the illustrative cases that might be supposed, that of a trustee in possession is the one which may most frequently afford the least opportunity for developing, even when it exists, the adverse character of the trustee's attitude toward his *cestui que trust*. But the action of the courts fully prove that twenty years, at the longest, has, from the earliest period, barred the remedy by a *cestui que trust*, against a trustee for an account or

or other compensation in equity, precisely on the same principles that a remedy is barred in the other cases above put as examples.

2. The principle that, if he disclaims the continued existence of the trust, or denies that his possession is under it, a trustee may set up the Statute of Limitations against his *cestui que trust*, is distinctly asserted, illustrated and proven in

Kane v. *Bloodgood*, 7 *Johns. Ch. R.*, 121 *to* 125.
Willison v. *Watkins*, 3 *Peters*, 54.
Boone v. *Chiles*, 10 *Peters*, 223.
Seymour v. *Freer*, 8 *Wallace*, 218.

The statement in the deed to Dyson, that Matthew St. Clair Clarke took all the consideration money is a complete renunciation, and disclaimer by Boorman, the defendant's testator. (*Rec.*, *p.* 205.)

3. The class of circumstances from which a still continuing existence of the relation, or an acknowledgment of an open existing unexecuted trust, or a trust still *in fieri*, may be adjudged so as to prevent an inception of that hostile or adverse status on the part of the alleged trustee, which is essential to set the limitation-term running, is well exemplified and stated in

Carroll v. *Carroll*, 11 *Barb.*, 295.

In order to invoke in their favor the principle of an open subsisting trust, still in course of execution, and fully acknowledged to be so by Mr. Boorman at a recent date, the plaintiffs rely upon the fact that in 1861, Mr. Boorman, as executor of James R. Smith, received the dividends in arrear on a small parcel of stock in a Central New York Bridge Company, and sold the stock itself, the produce of both transactions amounting in the whole to $114.77 (*Rec.*, *pp.* 18, 24).

Byrne v. *Freer*, 2 *Molloy*, 184.

This circumstance cannot avail the plaintiffs. This is not a suit for an account and payment over of James R. Smith's personal estate, for which Mr. Boorman was accountable as executor. The plaintiffs have no right to call for such account

and payment; no one but the executor or administrator of Jeanet Clarke, or of her son George A. D. Clarke, could maintain such a suit. The plaintiffs, as *heirs* of George A. D. Clarke, have no title. Mr. Boorman's acknowledgement that he was still *executor*, and, as such, entitled to any personal estate of James R. Smith that might "turn up," is not an acknowledgment that he was still a trustee of James R. Smith's real estate, in possession, as such, of his real estate, and still engaged in the performance of duties as such trustee. However mixed or mingled they may seem to be by the provisions of the will, or by their union in the same person, the testamentary office of executor and the office of trustee of real estate, are always separate and distinct in judgment and contemplation of law. *Parsons* v. *Lyman*, 5 *Blatchford's R.*, 173. *Conklin* v. *Egerton*, 21 *Wend., pp.* 436 *and onward. Dominick* v. *Michael*, 4 *Sand. S. C. R.*, 409 *and onward. Bain* v. *Sadler*, 19 *Weekly Reporter p.* 1077.

By way of showing some connection of this sort between the offices of devisee in trust and that of executor, and to bring both, as things identical, within some vague principle that excludes limitation, the plaintiffs' counsel cites an inadvertence of Chanc'r Kent in *Decouche* v. *Savetier*, 3 *Johns. Chy. R.*, 190. A short explanation will suffice to put out of the way altogether that decision, which, even if unexceptionable, would be, in fact, irrelevant. It is true that in England, a legatee or distributee, of personalty had, and perhaps he yet enjoys, the peculiar distinction of being unaffected by any positive technical bar, on the ground of limitation (2 *Merivale*, 307; 2 *Vesey, Jr.*, 272, 581.) Yet, we may remark, in passing, that so strong is the judicial sentiment of repugnance to stale claims that, after a great length of time, Equity will refuse relief even to him *Comber* v. *Graham*, 1 *Russ. & Mylne*, 450. CHANCELLOR KENT, in *Kane* v. *Bloodgood*, 7 *Johns. Chy. R.*, 125, admits that in *Decouche* v. *Savetier*, he was misled by the English rule, which was not applicable in the State of New York. As early as January 5, 1789, before the passage of the Federal Judiciary Act, a statute was passed authorizing an action at law for legacies and distributive shares, against executors and adminis-

trators. Consequently, the jurisdiction at law and in equity being concurrent, the same limitation applied in both courts. This analogy, of course, governs wherever the suit is brought; and, consequently, limitation bars a claim for an account against an executor in the Surrogate's Courts. *McCartee* v. *Camel*, 1 *Barbour's Ch. R.*, 455.

In closing this episode we may add that an executor can never be regarded as no longer executor, for he is clothed with an official appointment, its duration is for life and no neglect or disclaimer can prevent its continuance. But the Statutes of Limitation are applied to him, and he is presumed to have fully accounted within the proper period. A full accounting includes a response for every part of decedent's estate which might have been collected or realized; and if, half a century after his appointment, we find an executor receiving some scraps or fragments of the assets, it is a fair presumption that he is entitled to hold them as his own. They come to him rightfully in reimbursement of what he was compelled to pay in respect of them to the legatees when he rendered his account. The fact may, indeed, sometimes happen to be otherwise, perhaps it was so in this case. When it is otherwise an honest representative, dealing with honest next of kin or legatees, will have no difficulty, and, if need should be, a Court of Equity might in some way give relief.

For instance, let us suppose a fair and liberal suit by a legatee, suggesting that this particular item of property had been entirely overlooked in all prior transactions and settlements between the executors and the legatees. If the plaintiff in such suit did not seek to disturb the past, but merely asked that this newly discovered item should be itself distributed, there would be much to commend his claim to a favorable consideration. But, if the claimants, as in this case, should seek, by technical reasoning, to make this petty collection of accidentally discovered assets a means of throwing open all ancient accounts and settlements, no court of law or equity would countenance a proposition so unjust and mischievous.

We now return to the general question.

The rule as to breaches of trust exclusively cognizable in

equity always was that they must be prosecuted at the furthest within 20 years. "Courts of Equity have, at all times, upon general principles of their own, even where there was no statutory bar [to an action at law for relief in the premises,] refused relief to stale demands, where the party has slept upon his rights for a great length of time."

1 *Hovenden's Suppl.* 214, *Note 2 to Jones v. Turberville*, 2 *Vesey Jr.*, 11.

This principle finds its fullest and ablest illustration in the great case of *Cholmondeley v. Clinton*, reported in 2 Merivale, before Sir William Grant, M. R., again in 2 Jacob & Walker on further directions, before Sir Thomas Plumer, V. C., on the coming in of the certificate on a case sent to the Court of King's Bench, and finally in 4 Bligh's, P. C., before the House of Lords on Appeal, Lord Eldon and Lord Redesdale being present. It turned upon the doctrine of lapse of time as a bar in Equity. A remarkably formidable corps of lawyers argued it; among them we find:

Mr. Leach, afterwards Sir John Leach, V. Chr.

Mr. Shadwell, afterwards Sir Launcelot Shadwell, M. R.

Mr. Sugden, afterwards Lord Chancellor St. Leonards.

Mr. Hart, afterwards Sir Anthony Hart, Lord Chancellor of Ireland. See his remarks on this case, *Byrne v. Frere*, 2 *Molloy*, 171.

Mr. Pepys, afterwards Lord Chancellor Cottenham.

Mr. Copley, afterwards Lord Chancellor Lyndhurst.

Atty. Genl. Giffard, afterwards Lord Giffard, M. R.

Mr. Bell, Mr. Preston, Mr. Charles Butler, and last, not least, Sir Samuel Romilly, whose argument in 2 *Merivale*, 242 *to* 260, is as fine a specimen of eloquence as can be found in the English Reports. Perhaps, in a dry law argument, it is unequalled for grace, clearness and force.

The defendant, Lord Clinton, entered into possession of the lands in question 15th December, 1791 (4 *Bli. N. S.*, 75), and the Marquis of Cholmondeley's bill in Equity, brought to recover them *on an equitable title* alleged to have accrued at that same date, was filed June 12, 1812. This was very slightly

beyond twenty years from the accruer of the plaintiff's alleged right. (See Sir T. Plumer's statement in 2 *Jac. & W.*, 141, asterisk paging.) The limitation was deemed a perfect bar. (See opinion of Sir Thomas Plumer, 2 *Jac. & W.*, 139 to 142, 152, 166.)

There was an attempt by counsel to make out that as equity must borrow its bar from the statute governing courts of law, if the case was one which, at law, might have been prosecuted by writ of right, the plaintiff in equity might be allowed the longer limitation applicable to the latter remedy.

Mr. Leach for pl'ff, 2 *Meric.*, 202.
Mr. Shadwell, same side, 2 *Meric.*, 217, 218.
Attorney-General Giffard, same side, 2 *Jac. & W.*, 63,

The defendant's counsel, in 2 *Meric.*, 306, cited early authority for the proposition that equity did not go upon distinctions of this sort, and had adopted, as its fixed term, that prescribed in the statute limiting ejectments. The argument of the plaintiff was met and distinctly overruled by Ld. Redesdale, in 4 *Bli.*, 80, 81, 117, 118, 119; *Blanshard on Limitations, p.* 79. At page 118, he says: "The different statutes made at different times have given different terms to the limitations of actions. The last, that of 21 James 1, limits certain actions upon particular writs which apply only to particular persons. The general provision that no entry shall be made by any person unless within twenty years after the right or title of entry shall have accrued, Lord Hardwicke and other judges in equity have said, is the provision in the statute on which Courts of Equity have acted. It has been attempted at your bar to argue upon the ground that Ld. Cholmondeley, claiming as heir, might bring a writ of right, if the question was open at law; but that is a particular writ in which particular privileges are allowed, and the Courts of Equity have never regarded that or the writ of *formedon* or any other particular writ, but have considered the limitation in the statute of James 1st, of twenty

years after the right or title of entry accrued as that which was to decide."

Acc. 3 *P. Wms.*, 281, *Note B.*; *Winchcomb* vs. *Hall*, *Reg. in Chy.*, 40.
Pearson vs. *Pulley*, 1 *Cases in Chy.*, 102.

It is also an established doctrine that this equity-rule limiting the judicial remedy, goes as strictly on the *punctum temporis* as the statutory bar at law.

Sir Th. Plumer, in 2 *Jac. and W.*, 139, says, "one day beyond is as much too late as 100 years."

Acc. Ld. Eldon, 4 *Bli.*, 35, 47, 71.
" Ld. Redesdale, *Ib.*, 87, 94, 97.

And the various qualifications or exceptions of the Statute of Limitations are applied in equity in precisely the same manner as at law.

a. Where a right to land in equity accrues to one under disability, the right in equity, as at law, is barred in ten years after removal of the disability.

3 *Peer Wms.*, 287, *Note B.*
Beleh v. *Harvey*, *Sugden on Vendors*, 5*th Ed. Appx.*, *p.* 19, *No. XV.*

b. So where one having a right to redeem, died, it was held the bar by limitation continued to run uninterruptedly against his *infant* heirs.

Blanshard on Limitations, *p.* 67, *citing Knowles* v. *Spence*, 2 *Eq. Ca. Abr.*, 314, *Case* 4.

The doctrine Cholmondeley *v.* Clinton, as held on the reversal of Sir Wm. Grant's decree, was that the analogy of equity to law is perfect, and that the longest limitation is that which bars a right of entry. It has been adopted in its whole length and breadth by the Supreme Court of the United States.

Cur. by McLean, J., *Miller* v. *McIntyre*, 6 *Peters*, 65 *to* 67.
Cur. by Ch. J. Marshall, *Elmendorf* v. *Taylor*, 10 *Wheat.*, 166 *to* 177.

Ch. J. Marshall examined the cases at large, and (10 Wheaton, 170) speaking of the *principle* found in them, says: "These decisions were made on bills to redeem mortgaged premises; but as no reason can be assigned why an equity of redemption should be barred in a shorter time than any other equity, they appear to us to apply with equal force to all bills asserting equitable titles. We have seen no dictum asserting that the rule is not applicable to other equitable rights, and we should not feel justified in drawing a distinction which has never heretofore been drawn. But we think the rule has been applied to equitable rights generally."

This should suffice for an answer to the vague and general point taken by the plaintiffs, that their bill is for the enforcement of a trust and that, therefore, no limitation can apply.

4. The defense of limitation cannot be repelled on the ground of *fraud*.

The Revised Statutes of New York, Vol. 2, p. 301, § 51, provide that "bills for relief on the ground of fraud shall be filed within six years after the discovery by the aggrieved party of the facts constituting such fraud, and not after that time."

Fraud is a very general term, and in its largest sense embraces every act or failure of duty which works an injury to another. But this statute and the pre-existing rule of equity which it codified, refer to one single and peculiar description of wrong. The nature of the original injury complained of is not the circumstance which gives the right to file this description of bill for relief. It arises only where the wrong-doer, for the purpose of effectually accomplishing and completely effecting an injury done by him to another's rights of property, and rendering it irremediable through any ordinary judicial means, has fraudulently concealed the fact until all such ordinary remedies are barred by lapse of time. The original wrong may be a simple trespass not itself cognizable in equity; but the fraudulent concealment during the whole period allowed for bringing an action, gives a right to equitable relief. The aggrieved party having lost his legal remedy through the artful contrivance of

the wrong-doer, and without negligence or other default on his own part, occupies a peculiar and exceptional position entitling him to extraordinary relief. He is essentially in a like condition with one who will be defrauded by means of a parol contract which is void at law, if his adversary should be permitted to object to parol evidence. In that case equity will award specific performance. So where a devisee procured the devise by fraudulently circumventing the testator's preference for another, equity will declare the former a trustee for the latter. Satire might denominate the proceedings in these cases respectively as bills to repeal the Statute of Frauds, the Statute of Wills and the Statute of Limitations; but they are in fact bills to prevent a fraudulent use of these statutes by one who would pervert them to purposes quite repugnant to the objects of their enactment. (*Per Ld. Redesdale, Bond* v. *Hopkins*, 1 *Sch. & Lefroy*, pp. 430, 433. *Cheetham* v. *Hoare, Law R.*, 9 *Eq.* 576.

When, but for the Statute-bar the remedy would be exclusively at law, equity, as it did in *Clark* v. *Cobley*, 2 *Cox*, 173, would always have confined its decree to an injunction against setting up at law the defence of limitation but for a special reason. When equity is obliged to act for one purpose, it is found to be generally expedient as well as just that an end should be made of the controversy in the first suit, thus avoiding the manifest inconvenience of double litigation.—*Taylor* v. *Merc. Ins. Co.*, 9 *How. U. S. R.*, 405, *point* 3; 4 *Cow.*, 649.

It was quite clear to Judge Dillon in the case of *Martin* v. *Smith*, before cited (9 *Phila. Am. Law Reg.*, 703), that this equity jurisdiction could not be invoked against every act which was in its own nature a fraud. He felt the necessity of some discriminating rule or definition which would enable jurists to distinguish it from ordinary frauds, and deplored the fact that Professor Story "does not discuss the nature of the fraud which, in equity, will prevent the bar of the statute from running, nor what, in the view of that court, will amount to a discovery of the fraud." Quoting many of the cases "as to the kind of fraud contemplated," he deduces from what "some judges have said, that the fraud which will avoid

the effect of the statute must be positive and *actual fraud*." If this be understood to mean willful and intentional fraud, not merely acts done intentionally, but acts of rapine, injuriously stripping another of his rights, done with a consciousness, on the part of the perpetrator, that they are illegal and unjust, there can be no doubt but his is precisely the "kind of fraud contemplated" by this equity-rule. It was not necessary to the case before him; so Judge Dillon declined to consider this point. But we submit that no other kind of fraud has ever been relieved against under this head of jurisdiction. This will readily be perceived by a glance at the cases. And yet the nature or kind of the original injury itself is not material or even an aid in considering or defining the cases in which, under this head of its jurisdiction, equity will relieve. It has just been stated that the original injury is not the ground of jurisdiction. The particular nature of that injury or the cognizance to remedy it is no element in forming this peculiar ground of relief. Perhaps it rarely occurs that any other wrong than one originally committed in a secret and fraudulent manner is made the subject of *subsequent* fraudulent concealment. Consequently though perversity of mind, and intended secrecy are not by any logical necessity, inseparable from the original injury, they are in the nature of things so frequently attendants of it that to a casual observer they might seem a necessary ingredient in a strictly accurate definition. In fact they are not so; the jurisdiction would be properly defined as relief in equity against an unconscientious use of prescription or limitation. Concealment by the wrong-doer of his unlawful act is the only thing which will justify the injured party in invoking, or equity in exercising this jurisdiction. Concealment will not suffice as a ground of relief unless it be positive and affirmative in its nature, nor unless it be practised by the wrong-doer.

The primary object of statutes limiting the time for prosecuting legal remedies, is to prevent unjust claims which the party prosecuted may from accidental causes have lost his means of resisting. These statutes are made positive in form from a just policy. It is better that the few who are likely to slumber upon their rights should suffer than that there should

exist so great an inconvenience as the toleration of stale claims. Blanshard on Limitation, pp. 3, 4. But they should not operate against a claimant who has been wronged in a manner that afforded him no immediate reason to appreciate his loss, and from whom the fact has been kept secret by the willful contrivance of the wrong-doer. This latter course of action being for the express purpose of perverting the Statutes of Limitations to a purpose directly opposite to their intent, equity will restrain the party from relying upon these statutes. It is on this latter ground alone, however; that the jurisdiction rests, although it is obvious that the fraudulent act must always, in point of fact, be positive, actual, and accompanied by a consciousness of its illegality and injustice; for if this were not the case, the *concealment* would never be practised. Secresy in the original act may, indeed, render mere silence by the perpetrator sufficient evidence of subsequent and continuous concealment until the discovery; but that very secresy is itself created by the perpetrator, and is the initiation of that positive concealment which in the nature of things must endure until the discovery.

This jurisdiction is only a practical application of the rule that fraud vitiates all things. Claims and defences in which it is present are alike deprived of a judicial hearing by that circumstance. *The Amistad*, 15 *Peters*, 594; see also, 9 London Jurist. Reports, N. S., page 899. Attempted frauds upon contracts by literal but unsubstantial compliance are remedied in some form or forum; attempted frauds upon statutes may, by the exigency and peculiar nature of the case, be irremediable in ordinary tribunals; but jurisprudence must defeat them, and for that purpose it provides an extraordinary tribunal, with power adequate to the task, however delicate and difficult it may be.

We state this point thus sharply and distinctly, because the plaintiffs' counsel, conscious that there is no color for a charge of fraudulent concealment by Mr. Boorman, seem to rely upon a position which we regard as altogether unsound. They seem to think that if Mr. Boorman, without fraudulent intent but in perfect innocence and integrity of purpose, acting under mistaken views of his own, or under mistaken advice of counsel, united in exercising the power of sale, and that act has been

subsequently discovered to be unwarranted in law, and injurious to George A. D. Clarke, Mr. Boorman's estate may, notwithstanding that he neither designed or practised any concealment of the facts, be charged in damages by the representatives of George A. D. Clarke, at any period, however distant, provided it be within, say six years, after he or they become possessed of such clear knowledge of the law and the facts as fully to comprehend the *mistake* which was committed to the detriment of their ancestor.

Placing their claim to exemption from the statutory bar of limitation on this very peculiar ground, of fraud confused with *mistake*, the plaintiffs have offered a quantity of very flimsy and unreliable evidence, intended to show, on the part of George A. D. Clarke, poverty, carelessness and stupid disregard of duty to himself. No authority has been cited by the plaintiffs to sustain this ground of action, or to show the relevancy of such evidence. We have met with nothing that deserves the name of authority tending in that direction. Baron Alderson in *Brookshank* v. *Smith*, 2 *Young and Collier's Exch. R.*, *p.* 60, speaking of this jurisdiction to relieve against the statutory bar on the ground of fraud, says, "mistake is, I think, within the same rule as fraud." This dictum is hastily adopted in *Story on Equity Pleading*, §§ 754, 815, *a*, and in 2 *Story's Eq. Jur.*, 1521, *a*. Baron Alderson is the only citation in either book; and the authorities are all against him.

Sir Thomas Plumer, in *Cholmondeley* v. *Clinton*, 2 *Jac. & Walker*, 139, 142, says, that against the bar of limitation "no * poverty, ignorance or mistake can be of any avail." *S. C.*, 4 *Bligh's P. C.*, new series, 89–99–100. Sir Anthony Hart, who was counsel in that case, reiterated this doctrine very strongly, when he was Lord Chancellor of Ireland, in *Byrne* v. *Frere*, 2 *Molloy's R.*, 157.

See to the same as to poverty, *Roberts* v. *Turnstall*, 4 *Hare*, 267 to 269, inclusive. Also *Champion* v. *Rigby*, 1 *Tamlyn*, 421, affirmed by 9*th London Law Journal Reports, new series, Chancery*, 211.

Citing *Ld. Redesdale*, the U. S. Supreme Court, in *Bowman et al. v. Wathen et al.*, 1 *Howard*, 194, says, that a Court cannot act upon such circumstances as poverty, distress and consequent

inability: "If it did there would be an end of all limitation of actions in the cases of distressed persons; for if the relief might be given after * * thirty, forty or fifty [years]; there would be no limitation whatever, and property would be thrown into confusion,"

Combating the notion that where no concealment was practised by the wrong-doer, the remedy for alleged fraud could be exempted from the statutory limitation, because, from serious intrinsic obstructions the aggrieved party *did* not discover the fraud in time to bring his action, CHIEF JUSTICE SPENCER, in 20 *Johns.*, 48, says, "What he [the wrong-doer] did was visible, and what he neglected to do would or might have been discovered by repairing to the land * * and it was neither impossible nor impracticable to find out the fraud. That the lands were in a state of nature and thickly covered with forest trees and underwood, certainly would not have prevented the detection, had means been adopted for the purpose." This may be regarded as only a dictum; but it is the opinion of a very able Judge and furnishes more than a sufficient answer to Baron Alderson's notion.

In the State of New York prior to the Code of Procedure, it was distinctly and uniformly held, that the fraudulent *concealment* which might entitle the plaintiff to relief in equity could not be *replied* in a Court of law to the plea of the Statute of Limitations.

Troup v. Smith, 20 *Johns.*, 47, 48.
Allen v. Mille, 17 *Wend.*, 205.
Leonard v. Petney, 5 *Wend.*, 32.

The supposal of some commentators and annotators (as *Angell on Limitation, Ch.* 18, § 185, *note to Am. Ed. of Veath Exch. p.* 44), that the cases in U. S. are in some conflict on the question is probably a misconception. In States which have no equity courts, or where law and equity are indistinguishable, the distinction taken in *Troup* v. *Smith*, 20 *Johns.*, 47, 48, is, of course, disregarded.

Neither ignorance or mistake by the defendant, poverty and consequent inability on his part to seek a remedy, nor even fraud *simpliciter* in the original transaction, nor all of these

put together, will prevent the statutory limitation or its analogue in equity from barring a claim; fraudulent *concealment* by the defendant is the sole basis of this peculiar relief in equity.

"No case can be found where the statute has been avoided at law or in equity unless on the ground of fraudulent concealment on the defendant's part."

Cur. per Mellen, C. J., Bishop v. *Little*, 3 *Greenl.*, 408.

In *Badger* v. *Badger*, 2 *Wall.*, 92, a gross fraud was charged, Judge GRIER, delivering the opinion of the court, says that, in order to avoid the Statute of Limitations in such case, "the facts must have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*." (See 2, *Clifford*, 154.)

Acc. Wells v. *Child*, 12 *Allen R.*, 335.

That the defendant acted fraudulently *i. e.*, with bad motives and a consciousness of violating right in the transaction sought to be impeached, does not prevent the statute-bar or its analogue in equity from running. This was held in—

Humbert v. *Trinity Church*, 24 *Wend.*, 602, 603.

There is a total absence of authority for the proposition that for mere negligence or mistake by which the plaintiff has been injured, this kind of bill in equity can be maintained.

12 *Allen*, 335, *and cases cited.*

The cases under this head are founded on intentional and studied concealment of his liability, accompanied by profit to the perpetrator.

Where the defendant unconsciously and by mistake converted the property of another to his own use, thereby, of course, deriving a profit and increasing his estate, LD. CH. BARON POLLOCK, in *Hunter* v. *Gibbens*, 2 *Lond. Jurist*, *N. S.* 1,251, thought equity would not relieve against the *mistake* after the statutory bar had attached, even though the plaintiff had remained entirely ignorant of the wrong until shortly before suit brought.

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We have met with but one case where, in the exercise of this peculiar equity, an honest man has been refused the benefit of the bar by limitation. One of the partners of a firm which had been entrusted with money, misapplied it; and after the firm had been dissolved, he kept the employer in ignorance of the fraud by regularly paying interest for ten years. The court held the innocent partner liable and debarred from relying upon the Statute of Limitations by the fraudulent concealment which his former partner had practised (*Blair* v. *Bromley*, 5 *Hare*, 542; *S. C. on Appeal*, 2 *Phillips*, 354). This case was quite in harmony with English ideas as to the power of a partner to keep alive indefinitely, a claim against the firm. But we submit that the notion is contrary to justice and sound policy. It is not law in the State of New York (*Van Keuren* v. *Parmelee*, 2 *Comst.*, 530; 29 *N. Y. R.*, 178, 179).

The Article of our N. Y. Revised Statutes in which this 51st Section, concerning bills for relief on the ground of fraud is found, is entitled, "Of the time of Commencing Suits in Courts of Equity." It was intended to put into the form of statute law the pre-existing rules on this subject with, of course, such modifications as seemed proper. In this particular case the only change was a reduction of the time allowed. Twenty years *from discovery* was not allowed in all cases by the English rule. No more than an undefined reasonable time after discovery was allowed; *Byrne* v. *Frere*, 2d *Molloy*, 157. This undefined term, not exceeding twenty years, the New York revisers altered to a definite term, *i. e.*, six years. *See their note*, 3 *R. S.*, *N. Y.*, 705, *Second Edition.*

That revision soon excited the attention of English jurists and legislators, And, from time to time, Parliament adopted all such parts of it as were deemed beneficial. The Law of limitations was remodeled in 1833. (See 3 *and* 4 *William 4th*, *Ch.* 27.) This statute is an exceedingly careful codification of the pre-existing law, Its 26th section enacts the rule in this class of cases, and is as follows:—"In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such

fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might have been first known or discovered." *L. R.*, 9 *Eq.*, 576.

The words of this clause, and the decisions upon its construction, may serve a useful purpose in solving the question or questions which Judge Dillon left undetermined, and which certainly are not much elucidated by *Carr* v. *Hilton*, 1 *Curtis*, 237, 238, to which he refers with great commendation. The statute speaks not of a secret fraud, an unknown or undiscovered fraud, but a "concealed fraud." Vice Ch. Kindersley, in *Petre* v. *Petre*, 1 *Drewry*, 397, says, this "does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud by which a party, knowing to whom the right belongs, conceals the circumstances giving that right and by means of such concealment enables himself to enter and hold." In *The Att'y Gen'l.* v. *Payne*, 27 *Beavan*, 171, a trustee for a corporation leased its lands to a trustee for himself under a mistaken apprehension that he had a right to do so. Arguing the point of limitation, counsel for the defense said, that "Fraud there was none; it was an open, notorious act, in accordance with an old established custom, and no one claiming under the corporation * * can say that it was concealed."

Here his argument was interrupted by Sir John Romilly, M. R., observing, "I do not think it was a fraud." What does constitute a fraud within this Statute and this principle of equity is well exemplified in *Sturgis* v. *Morse*, 24 *Beavan*, 541, *Ib.*, 545.

But that our point as to the necessity of a concealment is superabundantly proven, the attention of the court would be called to many other arguments in its support. The doctrine as to the *onus probandi* and the impracticability of proving notice would furnish ample materials.

On the question of fact, it must be concluded in the present case that Mr. Boorman never practiced the least intentional concealment. He had no interest or other motive to prompt him to a wrong. The suggestion that he was of a pliant, yielding temper, and affectionate towards his friends to an excess

that was a fault, is wholly without proof. There is not even color for it. Successful New York merchants are not usually made of such materials. He acted on able advice, supposed he was acting correctly, and had no motive for concealment. His acts were, in their nature as public as such acts ever are when they are perfectly lawful and proper. They could not have been made more public unless they had been industriously advertised in the newspapers, or the city scavenger, the only parallel in our times to the ancient town crier, had been employed to bawl about them through the streets as he rang out his calls for garbage. The conveyance complained of "was made with every act of publicity naturally attending the conveyance of an estate." *Per Spencer, J.*, 12 *Johns*, 557.

The deeds now objected to could not avail the parties who solicited them, unless put upon record; and there, they would necessarily be open to all the world. On their face it was proclaimed that Mr. Boorman had received no money on account of the sale, and of course that he disclaimed accountability for the proceeds. He denied that he held it in trust or at all.

The notion of concealment by him is but faintly urged, and is wholly unsupported by evidence. In fact, it is negatived by all just inferences from the evidence.

Under this head of limitation we insist, first, that the lapse of nearly twenty-two years since the claim accrued to George A. D. Clarke forms a perfect bar; secondly, that the alleged wrong, if committed, is not within the principle on which equity relieves against the common bar by limitation, inasmuch as there was no concealment by Mr. Boorman. Consequently, this point also is alone a perfect shield to the defendants.

4. We have carefully examined the cases and text books cited by the plaintiffs; but we do not conceive that there is any discourtesy to the counsel, or neglect of duty to our clients or the court, in restricting our comments, as we do, within very narrow limits.

In *Bowen* vs. *Evans*, 2 *House of Lords*, 282, it is stated that "upon fraud clearly established no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction

of equity depriving them of the effects of their plunder." But this is an extra-judicial dictum. No facts in the case called for it; it is plainly subject to many unexpressed qualifications, and it is totally uninstructive for want of any definition of the fraud referred to. Besides, it was stated, as a concession to the plaintiff, in arguing against and repelling his claim *P.* 285.

The fraud alleged (falsely as it appeared), consisted in acts of the tenant for life under a strict settlement in tail, with remainder to his issue. He died without issue in 1837. The bill charged the fraud as a secret one and alleged concealment. It was filed in 1843, by an ulterior remainder man, to whom the lands were limited in case issue of the tenant for life should fail. This remote remainderman's right to the property did not accrue until 1827, which was less than sixteen years before their suit. There was yet four full years before any bar by limitation would attach, even if no fraudulent concealment had been alleged. 2 *House of Lords, pp.* 264, 282. These facts distinctly appear in the case below. 1 *Jones & La Touche, pp.* 179, 251, 252.

This case of *Bowen* v. *Evans*, belongs to a class which illustrates the only peculiarity between the doctrines of equity and those which had place in the courts of law on the subject of limitation. In the latter, lapse of time, however great, was no bar until made so by statute, but in equity courts failure to seek relief within a reasonable time was, in discretion, a bar. Consequently *laches* by the plaintiff for a term much shorter than any statutory limitation, was often fatal to his suit. It is in reference to this objection of *staleness* that we meet with certain loose remarks about "no time being too late to unkennel a fraud," &c., &c.

The complainants' favorite citation is *Michaud* v. *Girod*, 4 *How., U. S. R.*, 503. It must, therefore, receive full attention. The suit was brought in Louisiana, by the heir of a decedent against his executor. The executor had obtained, in his own favor, irregular judgments against the decedent's estate for about $50,000, without any appearance by the heirs or by any competent representative in their behalf. He had then, through a friend, purchased for his own use the testator's estate, at a public auction sale controlled by himself. The sale was more

than twenty-six years, but less than thirty years, before suit brought (*pp.* 530, 561).

Mr. Janin, as counsel for the plaintiffs, in his point 17, states, in substance, that the technical action in the State law, of which that suit was the analogue in equity, was the action of revendication, and that "no other prescription but that of thirty years would, by the law of Louisiana, bar" that action. *P.* 552. In that same point 17, the counsel states the legal principles bearing upon limitation as affecting suits in equity, with great precision and accuracy, insisting, among other correct propositions, that "the Courts of the United States, sitting as Courts of Equity, apply the Statutes of Limitations of the respective States." Further, in his points 11, 12, 13, 14, pp. 549, 550, he shows, quite clearly, that the thirty years' limitation was the only one applicable to such a case; and what is of vital importance in considering this decision as an authority in the matter of limitation or prescription, he further shows that the defendants did not plead, in their answer, this or any other prescription, except one of ten years, which was wholly inapplicable.

The frauds alleged were of a most flagitious kind; the evidence of concealment and intentional deception on the defendant's part, for the purpose of concealing his delinquency, was full and ample.

The opinion of the court, delivered by WAYNE, J., contains nothing relevant to the present case; but it does contain a statement which, if not confined, as doubtless was his Honor's intent, to the local law of Louisiana, as cited and relied upon by Mr. Janin, we submit is not sound law. At page 561 the opinion is as follows: "In a case of actual fraud, we believe no case can be found in the books in which a Court of Equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it." If this was designed as the announcement of a general rule of equity in England and this country, it was certainly erroneous, and is without even a color of support in adjudged cases, or even in elementary works printed previously to *Michoud* v. *Girod*.

But we conceive the Judge could not have intended to be so.

understood. The argument of an able advocate on the prevailing side, when, as in this case, reported with the decision, may well be resorted to for the elucidation of difficulties; and therefore we have shown that Mr. Janin did not claim any such doctrine, except as the equity analogue to the local prescription of Louisiana.

From that circumstance we are warranted in supposing that, by the words quoted, the learned Judge meant simply to signify his acceptance of that able jurist's position. It is only by such an interpretation of the language that this part of the opinion can be saved from the character of an *obiter dictum*—as such it would be without authority in any case; and, with that interpretation, it is wholly inapplicable to any case not governed by the local law of Louisiana.

James Boorman was a New York merchant of great respectability (Green's testimony; *Record*, p. 92).

He employed, to advise in this business, Peter W. Radcliff, an eminent and upright lawyer (McKeon's testimony; *Record*, p. 92).

Acting under the advice of this counsel (*Rec.*, p. 250), he, at the request and on the indemnity of all the three daughters, in July, 1830, assented to the final division now complained of (*Rec.*, pp. 235 to 239, and pp. 205 to 211).

After George A. D. Clarke came of age, and in the autumn of 1843, when about to marry, he came to New York, consulted Lewis B. Woodruff, Esq., as counsel, aided in perfecting the title of certain purchasers from his mother of lots included in her "reserved part," and confirmed by solemn grants the titles of such as required it (Testimony of *Lewis B. Woodruff*; *Rec.*, pp. 93 to 96). Andrew Thompson's deposition in *Rec.*, p. 96, confirms Mr. Woodruff. One of these grants by George A. D. Clarke is in the *Record*, at pp. 156 and 146.

John M. Knox (*Rec.*, p. 98) proves that the lots therein granted are part of Jeanet's "reserved part," conveyed to her.

Taking this indemnity is claimed to be evidence that Boorman, the executor, and Radcliffe his lawyer, were conscious that in conveying the reserved parts, they were violating right towards George A. D. Clarke. This is a misconception. The main question amongst all the lawyers, P. W. Radcliffe,

George Wood, S. Cambreleng, was concerning the limitation over on failure of issue contained in the 12th section of the codicil, which is very defectively expressed. We state the questions on it, but they are probably quite immaterial. They only reflect light on this question of *motive* in the actors.

1. The contingency is expressed in these precise words, to wit:

"If either of my daughters shall die without lawful issue or having issue which shall not attain the age of twenty-one years and * without issue."

Stopping at the first alternative, and supposing that there were no words employed which could tie down the contemplated failure of issue to the death of the first taker, *i. e.*, the daughter, it is settled law in the State of New York that this is a limitation upon an indefinite failure of issue. (*Lion* vs. *Burtis*, 20 *Johns*, 486, *S. C. in Error*. *Wilkes* vs. *Lion*, 2 *Cow.*, 333. *Waldron* vs. *Gianini*, 6 *Hill*, 603). See close and able review of these cases by DENIO, J., in *Leonard* vs. *Burr*, 18 *N. Y. R.*, 104 *to* 106. It will be observed that the gift to the first takers, in this 12th clause, is only found in the direction to divide; and that direction is to make the division to them, the first takers, "share and share alike and to their respective heirs." These are the appropriate and technical words of limitation for the purpose of giving a fee to each first taker in the share set off to him or her.

Besides, it is worthy of notice, that the thing given is the testator's "estate;" and this word alone, and without more, would give a fee, *Doe* vs. *Lean*, 1 *Ad.* and *Ellis*, *N. S.*, 239. *Jackson* vs. *Robins*, 16 *Johns. R.*, 587, 588. *Colclough* vs. *Colclough*, *Irish Rep.*, 4 *Eq.*, 287. If precedent to this limitation there had been an express gift to the daughter for life, her interest would nevertheless have been an estate in fee-tail, the limitation to her issue indefinitely, working an enlargement by implication of such life estate. But there is no such express gift for life, and, consequently, the narrowest interpretation that could be given is that the express gift to her of a fee-

simple was by the subsequent indication of an intent that the estate should descend to her issue cut down to a fee-tail.

At the time the will took effect a gift in fee-tail was instantly seized upon by the statute abolishing entails and converted into a fee-simple. *Vanderheyden* vs. *Crandall*, 2 *Denio*, 21. *S. C. on Error*, *Wendell* vs. *Crandall*, 1 *Comst.*, 495. *Van Rensselear* vs. *Kearney*, 11 *Howard, U. S. R.*, 297.

If, in this aspect, the doctrine of estates-tail could be eliminated from the construction, then an estate in fee-simple would rest in the first taker, *i. e.*, the daughter, unreduced, and the attempted limitation thereon to take effect thereafter upon an indefinite failure of her issue would be void. Void as a remainder, by the primary doctrines of the common law, because the whole estate was exhausted by the first gift; and not valid as an executory devise by the comparatively modern doctrines brought in under the Statutes of Uses and Wills, because too remote. *See observation of* DENIO, J., 18 *N. Y.*, 405, *before cited.*

2. The second branch of the alternative expressed in this devise-over next claims attention. It is as follows: "or having issue which shall not attain the age of twenty-one years, and * without issue." Unless something should be intended, implied or interpolated after the word "and" in this extract, the three last words must be rejected as unmeaning and senseless.

A literal reading of the extract would then be that the limitation-over was to take effect if the first taker should ever have any issue that should die under twenty-one, even though she should afterwards die with issue. An intent so absurd and nonsensical as that could not be admitted. Another interpretation is, that if all the issue left by her should fail to attain twenty-one, the limitation-over should then take effect. If this was the intent and could be construed to be the effect, then the limitation would not be too remote—would be capable of taking effect, and would not be quite so absurd as the former. But as the issue under twenty-one, left by her at her death, might marry and have issue, and yet themselves all die under twenty-one, this reading ought not to be accepted, if

any other can be reasonably adopted. If we should try to render the reading last suggested more sensible, by giving a very large and extensive import to the word "issue," and holding that the limitation-over was to be in suspense until some of the issue of the daughter, proximate or remote, should reach twenty-one, or that it was not to take effect until all of her issue, proximate or remote, had died under twenty-one, then the words extracted in this (2d) section of our argument would cast the limitation back into the category presented by the next preceding section. That is to say, it would be a limitation on an indefinite failure of issue. This would *defeat* the limitation-over, as a remainder by force of the conversion into a fee-simple, wrought by the act abolishing entails, or, if viewed as an executory devise, it would be void for remoteness under the rule against perpetuities. *Ld. Dungannon* v. *Smith*, 12 *Cl. & Finelly*, 560, 561.

3. It is evident, that something more was intended than is expressed in the extracts from the codicil above commented on, in sections 1 and 2 of this argument. At the place therein where we have uniformly inserted an asterisk, the word "die" should, no doubt, be interposed by judicial construction. If that word alone were thus added, the limitation would read as follows:

"If either of my daughters shall die without lawful issue or having issue which shall not attain the age of twenty-one years, and DIE without issue."

A judge who had made this addition, would find much difficulty in holding, that the limitation referred to issue living at the daughter's death; for it will be noted that, without any other or further explanation, the division among the ulterior devisees is to be made at the moment of the daughter's death, if she should not leave a husband, and in case she should leave a husband, then such division is to be made at the moment of his death. There is to be no waiting for subsequent events: no division is directed at a later period in case issue left by the daughter at her death should die under age. And here again we encounter the difficulty before suggested in section

2, that, unless this word "issue" is tied down to persons living at the daughter's death, it absolutely defeats the limitation, and if, in order to save the limitation, we *simply* tie it down to persons living at her death, and interpolate no other idea, those persons might all die under 21, leaving a numerous posterity to be cut off by the limitation-over. The testator could not have meant this; and if he meant to refer to that subsequent period when all her issue might be dead, without any of them having attained full age, the limitation-over, as before shown, would be void. And this would leave the pre-existing gift in fee simple to the daughter in full force.

Proprietors of the Church in Brattle Square, v. *Grant et al.*, 3 *Gray's Mass. R.*, 141, 156, 159.

4. Having exhibited the difficulties which attend all other readings of this limitation-over which have occurred to us, we now present that which seems the proper interpretation. We do so, by again reciting the clause, with an insertion in italics of certain words which serve to develop the intent:

"And if either of my daughters shall die, without *ever having had* lawful issue, or having *had* issue which shall not attain the age of twenty-one years, and *shall die before her*, without issue, then" over.

This avoids all illegalities, and absurdities or unreasonable results; it conforms to the presumable intent in cases of parental disposition in favor of issue. It is open to no objection except its verbosity. The words "without issue *living at her death*" would have met the whole object; but the scrivener may not have been a man of sententious brevity; and if he was, and had been afflicted with no more than the ordinary measure of ignorance on this general subject prevalent in his day, it is most probable that in adopting such brevity of expression he would have omitted the reference to the first taker's death, last italicised, and thus rendered totally ineffectual the intended limitation over. (20 *Johns.* 487. 2 *Cow.*, 358, 392, 393, 396, 399. *Paterson* v. *Ellis' Exrs.*, 11 *Wend.*, 259. "Inelegancies in rhetoric, and the use of unnecessary words"

may more properly be imputed to the testator than a departure from what must have been the leading object of the instrument. *Per Bartley, C. J., in Bank of Columbus* v. *Hinds*, 3 *Ohio State Rep., N. S., p.* 18. This was, doubtless, the construction adopted by all the lawyers referred to, as having considered the matter. On this construction, the limitation-over was valid. On no other admissible construction would it have been so. It was to take effect in *interest*, if ever, immediately upon the death of the daughter first taking, and it was to take effect, in possession, also at that same time, unless such daughter left a husband, and in that even there was a postponement until his death, but this postponement referred to possession only. Were it not that the first taker's estate was a fee, the devise over, on our construction, would have given an ordinary common law remainder. Her estate being a fee, is the circumstance which gave to the interests under the limitation-over the character of executory devises. That fee, however, was not a fee simple absolute but a base or defeasible fee-simple, liable to be defeated in favor of the executory devise over, in case such a contingency as that last above stated should occur.

5. Our construction, it will be seen, sustains this gift over as a valid devise. It could never take effect, however, unless the event or events on which it was limited should happen to occur. We shall have done with our comments on it, when we have presented our views as to the persons appointed to be the takers under it. The takers were the other children, or their issue in case they should die. If the death of the other children thus appointed to take in the first instance, which was to let in their issue as purchasers in their stead, be referred to a death in the testator's lifetime, there could be no difficulty under the circumstances in making a perfect title to a purchaser, as against the limitation-over.

All the children appear to have been of one accord; and it is obvious that by uniting in a proper conveyance they should make such title. If, by its true construction, the children so referred to as takers in the first instance, were required to be in life at the death of the daughter whose share was to go over, there might, under certain circumstances, be an imperfection in any title that could be given. It is not necessary for any pur-

pose of this case to consider at which period the interest, under the limitation-over would vest, *i. e.*, whether at the testator's death, or at the death of the first taker. If it were material, the weight of authority is decidedly in favor of the former view. (*Moore* v. *Lyons*, 22 *Wendell's R., p.* 119 .) For it will be seen that, according to the reading of this limitation-over last above presented, whenever a daughter had issue who reached twenty-one years of age, the limitation-over was, as to her share, forever defeated. *In re Thompson's Trusts*, 23 *Law Times, N. S., p.* 693.

6. It seems to us probable, that prior to the alleged division between the daughters, through the instrumentality of the sale to Dyson, the lawyers who examined the will, adopted three conclusions as to the limitation-over: 1st. That on its true construction it was void in point of law. 2d. That, if not void, there was no likelihood of the facts over occurring on which it was limited,—and 3d, that if any interest could accrue under it, such interest was alienable by the other three children.

The lawyers who examined the question as it concerned Jeanet Clarke's share in 1843, that is to say, Messrs. Wood, DeWitt, Thompson and Cambreleng, and Mr. (now judge) Woodruff, conceived that, as she had had issue, and such issue had attained twenty-one years of age, the gift over, even if valid as a devise, could never take effect as to her share.

If the sale to Dyson was unreal, and the facts which then transpired amounted in fact to a partition, it is evident that Mr. Radcliff conceived such an arrangement to be proper and just in its effect, and as not injurious to the rights of any one. His advising and superintending, as he probably did, the cross-mortgages between the children to guaranty due performance of the will, was a measure of superabundant caution, designed to guard against any possible injustice. The bond of indemnity to his friend Mr. Boorman had its origin in a like habit of mind.

That this bond of indemnity was not recorded is put forward as a piece of concealment indicating a consciousness of violating right on the part of Mr. Radcliff. The answer contains a suitable response to this nude suggestion. There

never was any law or usage to sanction such an act. Placing the four cross-mortgages on record, is affirmative proof of the most controlling kind that concealment was not contemplated.

The line of action or conveyancing adopted under Mr. Radcliff's advice was designed to guard against any future claim under the limitations-over by persons who might possibly adopt views of the construction altogether different from his own.

All that is said under this head is offered merely in response to the utterly groundless and indeed hardly relevant suggestion that Mr. Radcliff's precautions arose from a consciousness on his part that he was violating right. In *Sugden on Powers*, 8th Ed., p. 858, §§ 58, 59, 60, a merely formal sale under a power, in order to effect indirectly a partition between the real parties in interest, is pronounced unobjectionable.

There is then no evidence of *fraud* on the part of Mr. Boorman; there is no evidence that he did any thing secretly, or that he willfully and intentionally *concealed* any thing. And, nothing can be imagined more grotesque than the notion that Mr. Boorman's alleged *mistake* in signing the deed to Dyson, is by construction of law a *fraud*, and, consequently, that a remedy in respect of it will not be barred until there shall arise from the womb of time, some sage and very sensible descendant of Jeanet Clarke, and he shall have been fully possessed for six whole years of full knowledge concerning all the facts and circumstances connected with the disposition of the testator's estate, superior skill in judging of the legal question as to Jeanet's title than was possessed by Peter W. Radcliff. George Wood, Peter DeWitt, John Thompson, Stephen Cambreleng, and Judge Woodruff, plenty of money to carry on law suits, and last not least, plenty of time to perform the herculean task of travelling from Washington to the City of New York without inconvenience!

Whether this pleasant combination of advantageous circumstances will surround the earthly condition of any among Jeanet's posterity within the next five hundred years may be questionable. *Cheetham v. Hoare, Law Rep., 9 Eq.*, 577. The defendants insist that the wrong alleged, if any, was committed,

so as to give a perfect right of action, at the latest, on Mrs. Jeanet Clarke's death in 1847. The remedy whether at law or in equity, was subject to the limitation of six years. George A. D. Clarke was then of full age and he continued in life for eight years. The bar by limitation was therefore perfect.

Conclusion.

There is no evidence, and little reason to believe, that James R. Smith was, as suggested in the plaintiffs' brief, a wealthy merchant. It is not disputed, and indeed is pretty much conceded in the bill and brief, that all his personal property, and much of his realty, were required to satisfy his debts, and were fairly and honestly applied to that purpose by his executors. It is, in like manner, conceded that the partition of his remaining realty was fairly conducted, so that nothing remains to be cavilled about except the disposition made of his daughter Jeanet's reserved two-thirds, which, it seems, is correctly catalogued in the deed to Dyson, set forth in the bill. It was probably of comparatively little value at the date of that conveyance. It is conceded that, subject to such criticism as may be just in respect to this last point, everything else was transacted honestly, fairly, and even regularly. It is further admitted that, as long ago as 1830, Mr. Boorman substantially discharged himself of all possession, charge of, or control over the property, having made, as he thought and was advised, just and suitable dispositions of it. To this we may add, as the result of full proof and admissions, that Mr. Boorman, connected neither by blood, or marriage, or business relations or particular intimacy with any of the parties, acted with entire fairness and good faith, never appropriating a cent of the estate to his own use or benefit, and being governed in his proceedings by the advice of counsel as able, reputable and pure-minded as could have been selected.

From this basis of precedent fact, we proceed to the history of the forty years next succeeding 1830. During this period Jeanet Clarke and her friends and family, in their own way, consumed her share of the estate; and, near the close of it—far advanced in years, intact in reputation for honor, integrity,

prudence and good sense—James Boorman closed his active and useful life.

Mrs. Jeanet brought up and educated her only offspring, George A. D. Clarke, with, it must be presumed, the proceeds of her share. He was well brought up; it is manifested that he received a fair education. He married in 1844; and just previously to that event, doubtless for the purpose of providing funds to cover expenses incident to it, he and his mother made arrangements for the sale of lands in the city of New York, forming a part of her reserved two-thirds. Then, being over twenty-one years of age, he came in person to New York, and there, with the aid of able and honorable counsel, he superintended and completed that transaction. Thereupon he returned with the proceeds to his mother and *affiance* rejoicing in his success. In the course of this business he was advised that the right of his mother to dispose of the property was questioned; that her right depended not upon the power of sale, but upon the import and true meaning of his grandfather's will. From the call for his personal act of approval and confirmation with which this inquiry closed, it was impossible that he could have failed to see what is now evident. The whole thing turned upon the construction and effect of his grandfather's will; and the question being one of mere technical law, was whether his mother's title was absolute or subject to a limitation of some kind in his favor. On this point he consulted counsel, acquiesced, as Mr. Boorman had previously done, in their view of it, solemnly by deed ratified the conveyance through Dyson to his mother, and took into his own hands and enjoyed through the bright years of early connubial bliss the fruits of that ratification.

(*Sleeman v. Wilson, Law., Rep.*, 13 *Equity*, 43).

During the residue of his life he never murmured against the disposition now complained of by his re-married widow; and, for the last eight years of that time, he was solely entitled, as he well knew, to everything derived to his branch of the family from his grandfather's estate not lawfully disposed of by his mother.

(*Bowen v. Evans*, 1 *Jones & Latouche*, 246, 24).

After all this, fourteen years after his own death, more than twenty years after his mother's death, and half a century after that of his grandfather, this bill is filed in the names of his children against Mr. Boorman's estate to establish a construction of the will different from that on which his mother and he himself acted, different from that of many able lawyers; and on this new view of a technical point it is expected to prove the existence of a *mistake* by *all* of them—George A. D. Clarke himself included—which, by some casuistry, can be converted into a constructive *fraud* by *one* of them upon another, *i. e.*, by Mr. Boorman on George A. D. Clarke. Out of this pretty tissue of what, but for their unreasonableness and injustice, might be called whimsicalities, it is thought a Court of Equity and good conscience, can deduce some principle by which, after having for two whole generations lived upon the estate, devouring it in their need, James R. Smith's descendants in the third generation can extort its value from Mr. Boorman's family, and thus provide their race with a second fortune. If such things can be done men should beware how, from disinterested motives, they assume, at the request of dying friends, the office of executor. Equity should not aid to work out such results. *Pilcher* v. *Rawling's Law Reports*, 7 *Chancery Appeals*, 270.

We have not thought it necessary to review the singular testimony given concerning the mental "*calibre*" of Mrs. Jeanet Clarke and her son. There is no proof tending to show that either of them was *non compos*. Anything short of that is irrelevant in such a case as this; and if that could be proven, it would be fatal to the plaintiffs: for, if she was insane, all Jeanet Clarke's deeds are void and the plaintiffs can recover the land itself with all improvements.

The plaintiffs' counsel calls Mrs. Jeanet "weak," and some of the plaintiffs' evidence tends to show that in learning and wisdom she may not have been equal to Zenobia. The value of this testimony, however, may be estimated by the fact that it generally tends to prove that she and her son George A. D. Clarke were in point of intellect and capacity very much on a par. (*See deposition of Tallmadge P. Shaffner*, a witness for plaintiffs; *Rec., p.* 71.)

It is admitted that the son had a good memory, was clever in

many things, was for a long time teller of a bank, and for many years next preceding his death held a highly important and responsible situation in the Department of the Interior at Washington. It is admitted that he performed his duties in the latter place so acceptably that his salary, at first $1,200 per annum, was increased from time to time until it reached $1,600. (See deposition of plaintiffs' witnesses *Wm. Syphax and A. S. H. White, Rec., pp.* 43, 42.)

Without bringing against such palpably frivolous pretences of incapacity, the clear evidence of Judge Woodruff and Mr. Thompson to the contrary, we think we may safely conclude that no court would deny effect to the solemn ratification of 1843, especially as the parties acquiesced in it for a quarter of a century.

The decree should be affirmed.

JOHN M. MASON,
For Defendants and Respondents.

CH. O'CONOR,
Of Counsel.

GEORGE AUGUSTUS CLARKE AND JEANET VIRGINIA CLARKE, INFANTS UNDER THE AGE OF TWENTY-ONE YEARS, BY REUBEN MIDDLETON, THEIR GUARDIAN AND NEXT FRIEND,

vs.

JAMES B. JOHNSTON AND ADAM NORRIE, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF JAMES BOORMAN. IN EQUITY.

A codicil to a will contained the following provision: "The remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct, and not liable to the control, debts, or engagements of either of their husbands which they now have, or may hereafter have, as well those who are married as she who may hereafter marry, giving, however, to the husbands of either or all of them, in case the wife shall die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and, after his death, then to the child or children of my said daughter so dying." *Held*, that there was, in such provision, no expression or indication of any intention on the part of the testator, that there should be a limitation over in favor of the children of a daughter who should survive her husband; and that, where the husband of such daughter died, and she survived him, his death terminated the operation of the provision for his life estate, and the operation of the provision in favor of the child or children of his wife.

(Before BLATCHFORD, J., Southern District of New York, September 12th, 1871.)

BLATCHFORD, J. The prayer of the bill, in this case, is that the defendants, as executors of the last will and testament of James Boorman, may come to a just and fair account of the settlement of the estate of James R. Smith, the great-grandfather of the plaintiffs, James Boorman having been an executor, and the last surviving executor, of the last will and testament of James R. Smith, and may be ordered to deliver to the plaintiffs a certain legacy, alleged to have accrued to them under the will of James R. Smith, or, if that be impossible, to pay to them the just and present value of certain real estate, alleged to have accrued to them under such legacy.

James R. Smith, who was a merchant in the city of New York, died early in June, 1817, leaving a will executed January 23d, 1817, and a codicil executed May 30th, 1817, which were duly probated before the surrogate of the county of New York, June 11th, 1817. James R. Smith left surviving him four children: (1.) Jeanet, then the wife of the Reverend John X. Clarke, and who then had a child living, George Augustus Duncan Clarke, who was the father of the plaintiffs; (2.) Hannah, then the wife of Matthew St. Clair Clarke, and who then had children living; (3.) Elizabeth, then a minor, and unmarried, who afterwards became the wife of Joseph Duncan; (4.) James C. R., then a minor. By his will, James R. Smith appointed, as his executors, his widow, Hannah, and Andrew Foster, John Thomson, James Boorman, and Matthew St. Clair Clarke. Letters testamentary were granted to all of them but Foster. By his will, James R. Smith authorized his executors, in their discretion, to sell the whole, or any part, of his estate, real or personal, and directed that the residue of his estate, after the payment of his debts, should, unless the same, or any part thereof, should be otherwise disposed of, by codicil or codicils to his will, be distributed according to the laws of the State of New York, in the same manner as in case he had happened to die intestate. By the codicil, James R. Smith ratified and confirmed the will in all respects, except so far as any part thereof might or should be revoked or altered by such codicil. The codicil, after making various devises and bequests, in eleven clauses, proceeds as follows: "Twelfth. All the rest, residue and remainder of my estate, of every kind and nature whatsoever, and wheresoever situate, I give, devise and bequeath unto my said executors, in trust that the same shall be equally divided to and amongst my four children, share and share alike, and to their respective heirs. My will further is, that my son James and my daughter Elizabeth shall each have the sum of fifteen hundred dollars set apart by my said executors for their support and education, until they arrive at the age of twenty-one, and, if that sum shall not be found sufficient, my executors shall take such further sum, from their respective shares of my estate, as shall be necessary; and I do hereby give the tuition,

care and guardianship of my said son James and my daughter Elizabeth to my said wife. My will further is, that my son James shall not come to the full possession and enjoyment of his portion of my estate until he shall arrive at the age of twenty-five years, nor shall he have the power to pawn, pledge, mortgage or dispose of it in any way, the same or any part thereof, before the expiration of that time, but shall be entitled to receive the income arising from his portion between the years of twenty-one and twenty-five. I further direct, that my daughters Jeanet, Hannah, and Elizabeth, if she should arrive at the age of twenty-one years, shall have the privilege of expending and appropriating, by and with the consent of the executors, one-third part of their portion of my estate herein devised to them, in such manner as they may think proper, and over which, when so appropriated, they shall have absolute control; and the remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct, and not liable to the control, debts, or engagements of either of their husbands which they now have, or may hereafter have, as well those who are married as she who may hereafter marry, giving, however, to the husbands of either or all of them, in case the wife shall die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and, after his death, then to the child or children of my said daughter so dying, and, if either of my daughters shall die without lawful issue, or having issue which shall not attain the age of twenty-one years, and without issue, then the share or portion of my said daughter, after the death of her husband, or if there be no husband living at her death, shall go and be divided among my other children, share and share alike, and to their issue, in case of the death of either of them, share and share alike, such issue to take the portion that would have belonged to his, her or their father or mother." John X. Clarke, the grandfather of the plaintiffs, died in 1824. His wife, Jeanet, the grandmother of the plaintiffs, died in September, 1847. George Augustus Duncan Clarke, the father of the plaintiffs, was born in November, 1815, and died in October, 1855.

The question involved in this case arises under the twelfth

clause of the codicil. The plaintiffs contend, that, by the will and the codicil, the residue of the estate of James R. Smith, after the payment of debts and legacies, was devised to his executors, in trust, to be divided equally among his four children, share and share alike, and to their respective heirs; that each of the four children was to take one-fourth of the estate; that the son, James C. R., was to take his one-fourth in fee; that each of the three daughters was to take one-third of her one-fourth in full ownership, and a life estate only in the other two-thirds of such one-fourth, with remainder over, after such life estate, to her husband, if he should survive her; and that, after his death, the fee of such two-thirds of his deceased wife's one-fourth was to go to her child or children, if they attained the age of twenty-one years, and if they died before that age, and without issue, then to the other children of the testator, or their surviving heirs. This suit concerns the fee of the two-thirds of the share of the plaintiffs' grandmother, Jeanet, in which two-thirds the plaintiffs claim that their grandmother had only a life estate, and which fee they claim passed to their father on the decease of their grandmother. They allege that James Boorman, by his acts as executor, in willful default, in conjunction with Matthew St. Clair Clarke, acting as executor, in like willful default, placed such two-thirds of the share of the plaintiffs' grandmother, Jeanet, which two-thirds consisted wholly of real estate, in such a position that the title to such real estate passed into the hands of *bona fide* purchasers for a valuable consideration, without notice, whereby the plaintiffs and their father were deprived thereof entirely, and that, therefore, the estate of James Boorman must respond to the plaintiffs for such breach of trust, in the present value of the property of which they have been so deprived. By 1829, James Boorman and Matthew St. Clair Clarke had come to be the sole acting executors of the will of James R. Smith, the widow and Thomson having died, and Foster never having acted as executor. On the 1st of October, 1829, James C. R. Smith having attained the age of twenty-five years, and all the debts of the testator having been paid, a partition, division, and valuation of his estate, into four parts equal in value, was

agreed upon by the parties interested in it, namely, the three daughters, the husbands of Hannah and Elizabeth, and James C. R. By a deed of November 15th, 1829, all those parties, other than James C. R., conveyed and confirmed to him certain real estate described in the deed, which he thereby accepted as his one-fourth part of the estate. The two acting executors, described therein as surviving executors, joined in this deed. By a deed of the same date, executed by the two acting executors, and by Matthew St. Clair Clarke and his wife, James C. R. Smith and his wife, and Joseph Duncan and his wife, and which recited that the debts of the estate had all been paid, that the residue of the estate of James R. Smith consisted principally in real estate, that the daughters of the testator were desirous to appropriate their respective one-third parts of their respective portions of the estate, that the executors were willing that they should do so, that it was universally admitted by all the heirs and devisees, namely, the three daughters, the son, and the husbands of Hannah and Elizabeth, that a sale of the estate to convert it into money would be very injurious to all concerned, and that, by agreeing among the heirs, the whole of the real estate had been parted, divided, and valued, in four distinct and equal parts, the grantors conveyed to Jeanet Clarke certain real estate, in satisfaction of the one-third part of her portion, authorized by the will to be appropriated to her, and over which, when so appropriated, she was to have absolute control. By a deed of the same date, executed by the two acting executors, and by Jeanet Clarke, Hannah Clarke and her husband, and James C. R. Smith and his wife, and containing like recitals as the last named deed, the grantors conveyed to Elizabeth Duncan and her husband certain real estate, in satisfaction of the one-third part of the portion of Elizabeth, authorized by the will to be appropriated by her. By a deed of the same date, executed by the two acting executors, and by James C. R. Smith and his wife, Jeanet Clarke, Hannah Clarke and her husband, and Elizabeth Duncan and her husband, and which expressed a consideration of $8,948.68, and contained no recitals except that the executors, in pursuance of the power contained in

the will, had sold to the grantee, for such consideration, the real estate described in such deed, the grantors conveyed to one Robert Dyson such real estate. By a deed of the same date, containing no recitals, and expressing a consideration of $8,948.68, Dyson conveyed the same real estate to Hannah Clarke and her husband, to have and to hold to them and to the heirs and assigns of Hannah forever. These two deeds, the one to Dyson and the one from him, though not so expressed, were, in fact, conveyances of the one-third part of the portion of Hannah, authorized by the will to be appropriated by her, and were so given and received. By these conveyances, and others made at the same time or previously, the entire estate of James R. Smith was disposed of, except the two-thirds of the shares of each of the three daughters.

On the 26th of December, 1829, the two acting executors, James C. R. Smith and his wife, Jeanet Clarke, Hannah Clarke and her husband, and Elizabeth Duncan and her husband, conveyed to Robert Dyson, by deed, certain real estate therein described, which was in fact all the residue of the real estate left by James R. Smith. This deed expressed a consideration of $64,710.59, paid by the grantee to Matthew St. Clair Clarke, and stated that the executors had, for such consideration, and in pursuance of the power contained in the will, sold to the grantee the described real estate. On the same day, Dyson, by a deed, expressing a consideration of $21,573.13, conveyed to Jeanet Clark certain of the real estate so conveyed to him; and by another deed, expressing a consideration of $21,614.56, conveyed to Hannah Clarke and her husband certain other of the real estate so conveyed to him; and, by another deed, expressing a consideration of $21,522.90, conveyed to Elizabeth Duncan and her husband the residue of the real estate so conveyed to him. These deeds were all of them deeds in fee. It is of this conveyance to Dyson that the plaintiffs complain, as having disposed of the reserved two-thirds of the share of their grandmother, so as to deprive them and their father of the fee of such two-thirds. The real estate so conveyed to Dyson passed into the hands of *bona fide* purchasers. Such real estate represented

the two-thirds ot the shares of the three daughters, as agreed upon in the partition, and each of the three deeds from Dyson represented one-third of such two-thirds. As a part of this arrangement, it was agreed among all parties, that all the heirs should enter into a bond of indemnity to Mr. Boorman, to save him harmless on account of making the deed to Dyson; that James C. R. Smith should give to Matthew St. Clair Clarke an indemnity bond to the same import; and that Jeanet Clarke, and Elizabeth Duncan and her husband, should execute mortgages of certain property to Mr. Boorman and Matthew St. Clair Clarke, as an indemnity to the latter and further assurance to Mr. Boorman, such mortgages to hold until the trust named in the will concerning the two-thirds of the portions of the three daughters should have been legally extinguished or complied with. The mortgages contemplated were not given. But Matthew St. Clair Clarke, James C. R. Smith, Jeanet Clarke and Joseph Duncan executed, on the 10th of Ju'y, 1830, an instrument of indemnity to Mr. Boorman. That instrument recites the provisions of the twelfth clause of the codicil, the conveyance of real estate to the son for his one-fourth share, the conveyance of other real estate for the one-third part of the share of each daughter, the conveyance to Dyson, December 26th, 1829, of "all and singular the remaining two-third parts of the portions or shares of the daughters of the said testator, comprehending all the rest, residue and remainder of his real estate," the fact that no portion of the consideration of the sale to Dyson had been received by Mr. Boorman, but that it had, with the consent of all parties interested, gone exclusively into the hands of Matthew St. Clair Clarke, and the fact that Mr. Boorman had accounted for all the effects of the estate which had come to his hands, and had discharged himself of all the trusts reposed in him by the will and codicil, and then provides, that Matthew St. Clair Clarke and Duncan, for themselves and their wives, and the others for themselves, discharge Mr. Boorman from all moneys which he could have received in his trust, and from all claims concerning the estate of the testator, or any trust relating thereto, and agree to indemnify him from all demands by reason of his having executed any of the conveyances thereinbefore mentioned, or by

reason of any other thing by him done, committed or suffered, concerning the estate of the testator, whether under the trusts in the will and codicil, or otherwise. On the 30th of June, 1830, a mortgage was executed by Elizabeth Duncan and her husband to Jeanet Clarke, Hannah Clarke and her husband, and James C. R. Smith. It recites the provisions of the twelfth clause of the codicil as to the two-thirds of the shares of the daughters, and then proceeds: "and whereas, by mutual and universal agreement of all the parties interested, the whole of the said two-thirds of the real estate of the said James R. Smith, deceased, has been parted and divided, and, by divers conveyances, has been vested absolutely in the respective daughters and their heirs and assigns, and whereas it is the wish and intention of the said parties of the first part, that this indenture shall operate and be a security on the part of them, the said parties of the first part, for the faithful fulfillment of the provisions contained in the said recited portion of said will and testament and codicil." The consideration of the mortgage is $10,000, and it covers certain real estate in the city of New York. Its condition is, that the provisions contained in the recited portion of the will and codicil shall be fully and faithfully fulfilled on the part of the mortgagors, they to retain the right to rent and lease the property for a period not exceeding twenty-one years. This mortgage was recorded October 2d, 1830, and was satisfied of record January 19th, 1835. On the 10th of July, 1830, two other mortgages were executed, one by Jeanet Clarke to Hannah Clarke and her husband, James C. R. Smith, and Elizabeth Duncan and her husband, and the other by Hannah Clarke and her husband to Jeanet Clarke, James C. R. Smith, and Elizabeth Duncan and her husband. These mortgages contain similar recitals and provisions, and a like condition, *mutatis mutandis*, with the mortgage from the Duncans, and cover real estate in the city of New York. They were recorded October 2d, 1830, and were satisfied of record March 26th, 1835.

At the time the two-thirds of Jeanet Clarke's share of the estate was thus conveyed to her in fee, her son was but fourteen years of age. So far, therefore, as Jeanet Clarke's share was concerned, Mr. Boorman needed indemnity against the

contingency that such son might die under the age of twenty-one years and without issue, in which case the mother and sisters of Jeanet Clarke, or their issue, would come to take the two-thirds of the share of Jeanet Clarke.

The first question to be considered is the proper construction of the provisions of the twelfth clause of the codicil as to the two-thirds of each daughter's share. So far as Jeanet Clarke's two-thirds of her share is concerned, the fact that the plaintiffs' father survived his mother, and died when over twenty-one years of age, leaving issue, defeated the limitation over to her brother and sisters and their issue, in any view that may be taken of the provision for such limitation over. The only practical question, therefore, is, as to what estate Jeanet Clarke took in the two-thirds of her share of the estate. The controling provision is thus worded: "The remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct, and not liable to the control, debts or engagements of either of their husbands which they now have, or may hereafter have, as well those who are married as she who may hereafter marry, giving, however, to the husbands of either or all of them, in case the wife shall die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and, after his death, then to the child or children of my said daughter so dying." It is impossible to say that there is, in this provision, or in any part of the twelfth clause of the codicil, the expression or indication of any intention on the part of the testator that there should be a limitation over in favor of the children of a daughter who should survive her husband. The two-thirds of the daughter's share is to be held separate and distinct, so that it may not be liable for her husband's debts, and so that, if he survive her, he may have the income of it for his life. If he does not survive her, the fee of such two-thirds is freed from all possibilities in favor of her children, and remains subject only to the contingent provision in favor of the other children of the testator and their issue. The provision in favor of the child or children of a daughter "so dying," is one that is expressly made to take effect only after the death of the husband of a daughter who survives such

daughter. Jeanet Clarke survived her husband. His death terminated the operation of the provision for his life estate, and the operation of the provision in favor of the child or children of his wife. It is admitted, on the part of the plaintiffs, that they have no cause of action unless Jeanet Clarke took only a life estate in the two-thirds of her share, and unless, at her death, such two-thirds passed to the plaintiffs' father. As the two-thirds of her share did not pass to the plaintiffs' father, it follows that the bill must be dismissed, with costs.